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THE FELONY-MURDER RULE: IN SEARCH OF A VIABLE DOCTRINE*

INTRODUCTION

When a homicide has occurred during the perpetration of a felony, the felony-murder doctrine recognizes the intent to commit the underlying felony as a substitute for the mens rea normally required to support a murder conviction.¹ As a result of widespread recognition of the harshness

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¹ Under the felony-murder doctrine, the mens rea is established by proof of intent to commit the underlying felony, on a theory of constructive intent. When first applied in England, "constructive malice" was applied to all killing resulting from the commission of any unlawful act. E. COKE, *THIRD INSTITUTE* 56 (6th ed. 1680). Foster dictated that the unlawful act must be a felony. M. FOSTER, *CROWN LAW* 258 (2d ed. 1791). See 4 W. BLACKSTONE, *COMMENTARIES* 192-93 [hereinafter cited as BLACKSTONE], in which the author restated the rule:

[W]hen an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter If it be in prosecution of a felonious intent, or in its consequences naturally tended to bloodshed, it will be murder; but, if no more was intended than a mere civil trespass, it will only amount to manslaughter.

Id.

Murder and manslaughter were punished similarly at early common law, since they were the same crime (mens rea was not considered an element of the crime). *Id.* at 224. Both crimes were subject to the benefit of clergy, which allowed literate persons charged with crime—originally only members of the clergy—to be tried by ecclesiastical tribunals. This had the effect of harboring the felon from the gallows, since ecclesiastical courts did not impose the death sentence. For a discussion of benefit of clergy, see 1 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 441-57 (2d ed. 1898) [hereinafter cited as POLLOCK & MAITLAND].

When first developed, application of the felony-murder doctrine was of little consequence, since the punishment for all felonies was death, and it made little difference whether the guilty party was hanged for the homicide or for the underlying felony. See *Powers v. Commonwealth*, 110 Ky. 386, 416, 61 S.W. 735, 741 (1901). Benefit of clergy was later denied to murderers and their accomplices under a series of statutes passed between 1496 and 1547. 12 Hen. 7, c. 7 (1496); 4 Hen. 8, c. 2 (1512); 23 Hen. 8, c. 1, §§ 3, 4 (1531); 1 Edw. 6, c. 12, § 10 (1547). See POLLOCK & MAITLAND, *supra* at 476; Perkins, *A Re-Examination of Malice Aforethought*, 43 YALE L.J. 537, 542-43 (1934) [hereinafter cited as Perkins]. With the elimination of benefit of clergy for murder, the felony-murder doctrine operated to bring to the gallows those literate criminals who would otherwise be more leniently punished in the ecclesiastical courts for the underlying felony and the manslaughter.

In most states, the underlying felony must be one of those enumerated by statute or considered "inherently dangerous" to human life. See notes 12-37 and accompanying text *infra*.

Some states require not only that the death occur during the perpetration of the felony,

inherent in its application,² the doctrine has been subjected to a variety of limitations.³ Few states, however, have gone so far as to abolish felony

but also *in furtherance* of the criminal intent. See note 74 and accompanying text *infra*. Other jurisdictions extend "perpetration" to include attempts and/or flight from the scene. See notes 72-73 and accompanying text *infra*.

The felony-murder doctrine has been the subject of vitriolic criticism for centuries. Early critics included Judge James Fitzjames Stephen, who considered the felony-murder doctrine as stated by Coke "astonishing." Coke would have applied the doctrine to a death occurring as a result of any unlawful act. See E. COKE, *THIRD INSTITUTE* 56 (6th ed. 1680). Judge Stephen found even the Foster version of the rule, which required only that the underlying unlawful act be a felony, see M. FOSTER, *CROWN LAW* 258 (2d ed. 1791), to be "cruel and monstrous." 3 J. STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* 57-75 (1883). Judge Stephen has been credited with shaping the felony-murder rule in England by his instruction to the jury in *Regina v. Serné*, 16 Cox Crim. Cas. 311 (Q.B. 1887):

[I]nstead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life and likely in itself to cause death, done for the purpose of committing a felony which causes death, should be murder.

Id. at 313, quoted in S. KADISH & M. PAULSEN, *CRIMINAL LAW AND ITS PROCESSES* 277 (3d ed. 1975). See R. MORELAND, *THE LAW OF HOMICIDE* 43 (1952).

In America, the most renowned of the early critics of the felony-murder doctrine was Justice Holmes, who questioned the deterrent effect of the rule:

[I]f a man does an act with intent to commit a felony, and thereby accidentally kills another, . . . [t]he fact that the shooting is felonious does not make it any more likely to kill people. If the object of the rule is to prevent such accidents, it should make accidental killing with firearms murder, not accidental killing in the effort to steal; while, if its object is to prevent stealing, it would do better to hang one thief in every thousand by lot.

O. HOLMES, *THE COMMON LAW* 57-58 (1881).

Criticism of the rule continues unabated. See Hippard, *The Unconstitutionality of Criminal Liability Without Fault: An Argument for a Constitutional Doctrine of Mens Rea*, 10 Hous. L. Rev. 1039, 1945 (1973) [hereinafter cited as Hippard]; Moreland, *A Re-Examination of the Law of Homicide in 1971: The Model Penal Code*, 59 Ky. L.J. 788, 804 (1971); Note, *Felony Murder As a First Degree Offense: An Anachronism Retained*, 66 YALE L.J. 427 (1957) [hereinafter cited as *Anachronism*]. But see Note, *A Survey of Felony Murder*, 28 TEMP. L.Q. 453 (1955), wherein the author states: "It is submitted that the law should not be over solicitous toward the violator of public peace and safety, and if a man through the commission of a crime of violence contributes substantially to the death of another, there is no injustice in declaring that contribution murder." *Id.* at 466.

² The harshness of the rule stems from its imposition of substantial criminal liability for accidental deaths. See Hall, *Negligent Behavior Should Be Excluded from Penal Liability*, 63 COLUM. L. REV. 632 (1963). Particularly harsh is the application of the felony-murder doctrine in cases of vicarious liability of cofelons under conspiracy laws and by extension of proximate causality. See notes 71-91 and accompanying text *infra*.

³ One commentator suggests that the felony-murder doctrine may be considered unconstitutional to the extent that it obviates the necessity for proof of an element of the crime, drawing support for this contention from the Supreme Court's ruling that the burden of proof as to the affirmative defense of "extreme emotional disturbance" lies with the prosecution. See Rubin, *Homicide, Commentaries on the Maine Criminal Code*, 28 ME. L. REV. 57, 62 (1976). Another commentator writes:

Long-standing judicial approval of the presumption provides strong indication that the presumption comports with due process. The historical basis, however, is not in itself sufficient to establish the presumption's constitutionality. As the applicable standard

murder.⁴ Despite substantial changes in state homicide laws in recent

of constitutional scrutiny changes, the common law as embodied by statute must be reevaluated in light of the evolving standard.

Comment, *Constitutional Limitations Upon the Use of Statutory Criminal Presumptions and the Felony-Murder Rule*, 46 MISS. L.J. 1021, 1035-36 (1975) (citation omitted) [hereinafter cited as *Constitutional Limitations*]. But see notes 108-19 and accompanying text *infra*.

⁴ Only Hawaii and Kentucky have abolished the felony-murder rule. See HAW. REV. STAT. § 707-701 (1976) (Felony-murder rule); KY. REV. STAT. ANN. § 507.020 (Baldwin 1975) (current version at KY. REV. STAT. § 507.020 (Supp. 1977)).

England abolished the rule in 1957. See Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11, § 1, which provides:

(1) Where a person kills another in the course or furtherance of some other offense, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offense.

Id.

The fact that the doctrine was rarely invoked in England in the years preceding its abolition has been explained as a consequence of both the criticism of the doctrine and the "natural distaste" for a constructive theory of crime. Prevezer, *The English Homicide Act: A New Attempt to Revise the Law of Murder*, 57 COLUM. L. REV. 624, 635 (1957) [hereinafter cited as Prevezer]. In most cases where the doctrine was invoked by the courts without triggering a reprieve from the Home Secretary, malice could have been implied from an act intended or likely to kill or cause grievous harm. See *id.*

The distinction between the concept of constructive malice, which was abolished, and that of implied malice, which was specifically retained in the new murder statute, was then not altogether clear, since the terms had been used interchangeably in the past. See T. MORRIS & L. BLOM-COOPER, *A CALENDAR OF MURDER: CRIMINAL HOMICIDE IN ENGLAND SINCE 1957*, 313 (1964) [hereinafter cited as MORRIS]; J. TURNER, *KENNY'S OUTLINES OF CRIMINAL LAW* 140 (17th ed. 1958). It has been suggested that the term "implied" malice should have been replaced by an "inference" of malice where an inference of fact was intended. Perkins, *supra* note 1, at 550. It is now clear that malice is "implied," or may be inferred, from an intention to cause grievous bodily harm or from an act which is or should be known to be likely to cause such harm. "Constructive" malice is that implied by law where death has occurred in the course of an unlawful act.

It has been suggested that the elimination of "constructive" malice will have limited effect, since "the use of fiction in the law of murder has by no means disappeared," MORRIS, *supra* at 318, and since in many cases where the felony-murder doctrine had been applied in the past, intent could be implied. *Id.* It is submitted that this is one of the most persuasive arguments in favor of abolition of the doctrine: it is not necessary to the establishment of criminal liability in the majority of cases in which it has been applied, and its application to those cases in which death occurred wholly by accident—*i.e.*, without intent or likelihood of harm—is contrary to the modern trend toward establishment of culpability as the basis of criminal liability. See MODEL PENAL CODE § 201.2, Comment 4 (Tent. Draft No. 9, 1959); Hippard, *supra* note 1, at 1040; *Anachronism*, *supra* note 1, at 433.

It has been argued that Parliament should have eliminated the concept of implied malice as well, attaching the stigma of a murder conviction only to intentional killings and availing itself of the wide range of punishment available under manslaughter as a viable alternative. MORRIS, *supra* at 319.

Other commentators have suggested that what was abolished with one stroke of the pen was at least partially reinstated with the next, since murder in the course of or in furtherance of theft, shooting, or explosion was elevated to a capital crime. See Prevezer, *supra* at 648, 650-51. Capital punishment has since been abolished in England. See Murder (Abolition of Death Penalty) Act, 1965, c. 71.

years,⁵ the doctrine has survived the attacks of its critics and retained a significant degree of viability.

The reluctance of jurisdictions to abolish altogether the felony-murder doctrine apparently can be ascribed more to social and political pressures than to any flaw in the logic employed by the rule's critics. It is the purpose of this Note to attempt to determine which of the various limitations adopted can serve to justify the use of the felony-murder fiction as a substitute for intent to murder. To this end, the present limitations on application of the doctrine in the several jurisdictions will be outlined, and the major criticisms of the doctrine which survive these legislative restrictions indicated. There will then follow an evaluation of the relative merits of the limiting devices, in an effort to suggest the most effective manner of structuring the rule's application as an alternative to total abolition.

When New York's Penal Law was revised, the felony-murder doctrine was retained. See Schwartz & Skolnick, *Drafting a New Penal Law for New York—An Interview with Richard Denzer*, 18 BUFFALO L. REV. 251, 260-61 (1968-1969) [hereinafter cited as *Denzer*]. While some members of the Law Revision Commission favored abolition of the felony-murder rule, the majority "tried to be realistic in terms of what the community was ready to accept." *Id.* at 261.

Denzer acknowledges the trend toward establishing culpability as the basis for determining severity of punishment, but he argues that felony murder "deserves treatment equivalent to that of murder" with regard to culpability. *Id.* This view is contrary to that of the drafters of the Model Penal Code, who recommended the abolition of the felony-murder doctrine precisely because it conflicted with the Code's basic premise that criminal liability should be based on mens rea. Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1446 (1968) [hereinafter cited as Wechsler].

⁵ After the Supreme Court's capital punishment ruling in *Furman v. Georgia*, 408 U.S. 238 (1972), wherein the Court invalidated death sentences imposed upon three defendants in instances in which the statutory scheme allowed the jury discretion to impose the death penalty, states which sought to retain the death penalty were forced to revise their homicide laws. The alternatives available to retentionist legislatures are discussed in Wollan, *The Death Penalty after Furman*, 4 LOY. CHI. L.J. 339 (1973), wherein the author notes:

[A] retentionist alternative, to be constitutional, must be one that promises in its administration either greater frequency of death sentences or a "meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." . . .

One approach to lessen the infrequency of the death sentence is narrowing the range of offenses subject to the death penalty, so as to remove from its scope certain crimes, such as . . . felony murder, in which there are serious difficulties posed by the unintended quality of the homicide and the vicarious liability of co-felons. This will have the effect of increasing the frequency and rationality of death sentences for the remaining capital offenses.

Id. at 344 (quoting *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring)). While most revised statutes follow this reasoning and make felony-murder a non-capital crime, the majority also provide that intentional murder in the course of an inherently dangerous crime is punishable by death. That is, where the requisite mens rea may be otherwise established, expressly or impliedly, the fact that death occurred in the course of a felony is considered an aggravating circumstance which will, depending on the jurisdiction, either allow or require imposition of the death penalty. See notes 56 & 103 and accompanying text *infra*.

LIMITATIONS ON APPLICATION OF THE FELONY-MURDER DOCTRINE

The major limitations and the alternative of abolition

A consideration of the limitations on the felony-murder doctrine would not be complete without allusion to the alternative of abolition. The rule was eliminated in England over twenty years ago,⁶ and its passing apparently has not been mourned, perhaps because in most cases in which a constructive intent theory would have been applied, intent could also be inferred from the commission of a reckless act creating a grave risk to human life, thus precluding the need for invocation of the felony-murder doctrine.⁷ Only Kentucky and Hawaii, among American jurisdictions, have followed England's example.⁸ The Model Penal Code proposes what may be considered a "transitional" statute,⁹ which abolishes the rule, per se, but does not eliminate the significance of the underlying felony in determining criminal liability.¹⁰

Other states impose restrictions upon the rule only in instances wherein its unfettered application has produced the harshest results.¹¹ The limitations imposed upon the felony-murder doctrine by the various jurisdictions may be discussed in five categories: (1) Application of the rule only in cases involving inherently dangerous felonies; (2) Treatment of traditional felony murder as a lesser degree of homicide; (3) Requirement of a mens rea for felony-murder; (4) Recognition of merger and double jeopardy considerations as a bar to felony-murder prosecutions; and (5) Limitation of vicarious liability under the felony-murder rule.

Limiting the Felony-Murder Rule to Inherently Dangerous Felonies

Common law predicates for application of the felony-murder rule are restricted to inherently dangerous felonies—acts "known to be dangerous to life and likely in [themselves] to cause death"¹²—or those which be-

⁶ See Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11, § 1, discussed in note 4 *supra*.

⁷ The felony-murder rule was applied only rarely in the years immediately preceding its abrogation. Its use was restricted to "cases where there was ample evidence that the act was intended to kill or cause grievous bodily harm or where it was known, or at least should have been known, to be likely to have such effect." Prevezer, *supra* note 4, at 635.

⁸ See note 4 *supra*.

⁹ Professor Moreland has called the Model Penal Code provision a transitional statute, the felony-murder provision of which serves little purpose but to maintain a historical link to the past. Moreland, *A Re-Examination of the Law of Homicide in 1971: The Model Penal Code*, 59 Ky. L.J. 788, 803-04 (1971). Moreland suggests that "[i]t would be better to abolish the felony murder rule and prosecute such killings as negligent murders." *Id.* at 304.

¹⁰ MODEL PENAL CODE § 210.2(1)(b) (Prop. Official Draft 1962). For further discussion of the Model Code provision, see notes 47-51 and accompanying text *infra*.

¹¹ It is generally agreed that application of the felony-murder rule to impose vicarious criminal liability for the acts of a cofelon or third party produces the least justifiable results. See notes 104-07 and accompanying text *infra*.

¹² *Regina v. Serné*, 16 Cox Crim. Cas. 311, 313 (Q.B. 1887) (arson of building to collect insurance resulted in death of sleeping child). See *Director of Pub. Prosecutions v. Beard*, [1920] A.C. 479, 493 (rape victim smothered to prevent outcry).

cause of the peculiar circumstances of their commission foreseeably would create a grave risk of death or serious bodily harm.¹³

While several jurisdictions allow the felony-murder rule to be applied to any felony,¹⁴ a clear majority of jurisdictions limit application of the rule to homicides occurring in the course of certain statutorily enumerated felonies.¹⁵ In those jurisdictions which designate only certain felonies as grounds for a murder conviction, it appears to be the general rule that the felonies enumerated are those deemed by the particular legislature to be inherently dangerous; felonies which are not, however, regarded as danger-

¹³ See, e.g., *Rex v. Lumley*, 22 Cox Crim. Cas. 635 (K.B. 1911) (abortion). For a thorough discussion of common law predicates, see R. MORELAND, *THE LAW OF HOMICIDE* 47-54 (1952).

¹⁴ Any felony can serve as a predicate for a felony-murder indictment in Arkansas, ARK. STAT. ANN. § 41-1502(1)(a) (1977) (first degree murder); Georgia, GA. CODE ANN. § 26-1101(b) (1978); Kansas, KAN. STAT. § 21-3401 (1974); Minnesota, MINN. STAT. ANN. § 609.185(2), .195 (West 1964 & Supp. 1977); Mississippi, MISS. CODE ANN. § 97-3-19(1)(c), (2)(e) (Supp. 1977); New Mexico, N.M. STAT. ANN. § 40A-2-1(A)(3) (1972); Pennsylvania, PA. CONS. STAT. ANN. § 2502(b) (Purdon Supp. 1977-1978); South Dakota, S.D. COMPILED LAWS ANN. § 22-16-9 (Supp. 1976); Texas, TEX. PENAL CODE ANN. tit. 5, § 19.02(a)(3) (Vernon 1974) (any felony except voluntary or involuntary manslaughter); and Wisconsin, WIS. STAT. ANN. § 940.03 (West 1974). Illinois requires that the predicate be a "forcible" felony other than involuntary manslaughter. ILL. ANN. STAT. ch. 38, § 9-1(a)(3) (Smith-Hurd Supp. 1976). Maine enumerates nine serious felonies as predicates, ME. REV. STAT. tit. 17-A, § 202(1) (Spec. Supp. 1977), and Massachusetts limits application of the rule to "crimes punishable by death or life imprisonment." MASS. GEN. LAWS ANN. ch. 265, § 1 (West 1970). New Hampshire employs a rebuttable presumption of the requisite mens rea for "Class A felonies," N.H. REV. STAT. ANN. § 630:1-I(b) (1974).

A few states which specifically enumerate the predicate felonies add a catch-all phrase such as "any other felony," MONT. REV. CODES ANN. § 94-5-102 (1)(b) (Supp. 1976); N.C. GEN. STAT. § 14-17 (Supp. 1975), or "any unlawful act . . . the probable consequences [of which] may be bloodshed," N.J. STAT. ANN. § 2A:113-1 (West Supp. 1977-1978).

Though "any felony" may be the predicate, courts interpret this within the common-law requirements—the felony must either be inherently dangerous or create a substantial risk of death due to the peculiar circumstances of its commission. See, e.g., *State v. Moffitt*, 199 Kan. 514, 431 P.2d 879 (1967); *State v. Thompson*, 280 N.C. 202, 185 S.E.2d 666 (1972).

¹⁵ See ALA. CODE tit. 14, § 314 (1959); ALASKA STAT. § 11.15.010 (1970); ARK. STAT. ANN. § 41-1501(1)(a) (1977) (capital murder); CAL. PENAL CODE § 189 (West Supp. 1978); COLO. REV. STAT. § 18-3-102(1)(b) (Supp. 1976); DEL. CODE tit. 11, § 636(a)(6) (Supp. 1977); D.C. CODE § 22-2401 (1973); FLA. STAT. ANN. § 782.04(1)(a) (West Supp. 1978); IDAHO CODE §§ 18-4003, -4006(2) (Supp. 1977); IND. CODE ANN. § 35-42-1-1(a)(2) (Burns Supp. 1977); IOWA CODE ANN. § 609.2 (West Supp. 1977-1978); LA. REV. STAT. ANN. § 14:30.1 (West Supp. 1978); MD. ANN. CODE art. 27, §§ 408-410 (1977); MICH. COMP. LAWS ANN. § 750.316 (West Supp. 1977-1978); NEB. REV. STAT. § 28-303 (1977); NEV. REV. STAT. § 200.030(1)(b) (1977); N.Y. PENAL LAW § 125.25(3) (McKinney 1975); N.D. CENT. CODE § 12.1-16-01(3) (1976); OHIO REV. CODE ANN. § 2903.01(B) (Page 1975); OKLA. STAT. ANN. tit. 21, § 701.7B (West Supp. 1976-1977); OR. REV. STAT. § 163.115(1)(b) (1975); R.I. GEN. LAWS § 11-23-1 (Supp. 1978); S.C. CODE § 16-3-20(c)(a)(1) (1976); TENN. CODE ANN. § 39-2402(4) (1975); UTAH CODE ANN. §§ 76-5-202(1)(d), -203(1)(d) (Supp. 1977); VT. STAT. ANN. tit. 13, § 2301 (1974); VA. CODE §§ 18.2-31 to -33 (1975 & Supp. 1977); WASH. REV. CODE ANN. § 9A.32.030(c) (1977); W. VA. CODE § 61-2-1 (1977); WYO. STAT. § 6-54(a) (Supp. 1975). A statutory taxonomy of felony-murder law in America is presented in Adlerstein, *Felony-Murder in the New Criminal Codes*, 4 AM. J. CRIM. L. 249, 269-74 (1976) [hereinafter cited as *NEW CRIMINAL CODES*].

ous to life are not universally precluded from the enumerated lists.¹⁶ It does appear likely that most jurisdictions which enumerate the predicate felonies intend to prohibit application of the felony-murder rule where commission of an unlawful act creates a grave risk to life solely because of the peculiar circumstances attending its commission.¹⁷

The felonies most commonly enumerated as allowable predicates are arson, rape, robbery, and burglary.¹⁸ Kidnapping is often added to this list.¹⁹ Other felonies expressly specified are mayhem,²⁰ sexual molestation

¹⁶ See W. CLARKE & W. MARSHALL, *TREATISE ON THE LAW OF CRIMES* § 10.07, at 658 (7th ed. 1967).

¹⁷ Some jurisdictions apparently do not intend to prohibit application of the rule where peculiar circumstances make commission of an unenumerated felony a danger to life. Montana and North Carolina add as an alternative predicate "any other felony," while New Jersey's statute permits an indictment to be based upon "any unlawful act the probable consequences of which may be bloodshed."

¹⁸ States in which arson, rape, robbery, and burglary are the sole predicates are Alabama, Alaska, Vermont, West Virginia, and Wyoming. ALA. CODE tit. 14, § 314 (1959); ALASKA STAT. § 11.15.010 (1970); VT. STAT. ANN. tit. 13, § 2301 (1974); W. VA. CODE § 61-2-1 (1977); WYO. STAT. § 6-54(a)(Supp. 1975). Arson and robbery are specified predicates in all of those jurisdictions which limit application of the rule to enumerated felonies.

Rape is listed in 32 statutes. It is included in some recent statutes in other language. See COLO. REV. STAT. § 18-3-102(1)(b) (Supp. 1976) ("sexual assault in the first or second degree"); FLA. STAT. ANN. § 782.04 (1)(a) (West Supp. 1978) ("involuntary sexual battery"); MINN. STAT. ANN. § 609.185(2) (West Supp. 1978) ("criminal sexual conduct . . . with force or violence" sole predicate felony for first-degree murder indictment; all other felony-murder is third degree); NEB. REV. STAT. § 28-303 (1977) (sexual assault with use or threat of force, coercion, or deception); N.D. CENT. CODE § 12.1-16-01(3) (1976) ("gross sexual imposition"). The revised language is an apparent attempt to remove sexual distinctions from the criminal statutes. Other jurisdictions achieve like effect by adding sodomy, or "deviate sexual intercourse by force or threat" or similar language. See IND. CODE ANN. § 35-42-1-1(a)(2) (Burns Supp. 1977); MD. ANN. CODE art. 27, § 410 (1977); N.J. STAT. ANN. § 2A:113-1 (West Supp. 1977-1978); N.Y. PENAL LAW § 125.25(3) (McKinney 1975); OR. REV. STAT. § 163.115(1)(b) (1975); UTAH CODE ANN. §§ 76-5-202(1)(d), -203(1)(d) (Supp. 1977). Some jurisdictions include lesser sexual offenses. See N.Y. PENAL LAW § 125.25(3) (McKinney Supp. 1975) ("sexual abuse"); UTAH CODE ANN. §§ 76-5-202(1)(d), -203(1)(d) (Supp. 1977) ("aggravated sexual assault"). Sexual molestation of a child is included in some statutes. See note 21 and accompanying text *infra*.

Burglary is listed in 35 states. The District of Columbia enumerates "armed housebreaking" without mentioning burglary. D.C. CODE § 22-2401 (1973). Daytime housebreaking is added to burglary in Maryland, MD. ANN. CODE art. 27, § 410 (1977), and, in South Carolina housebreaking is one of the felonies which may predicate a capital murder conviction. S.C. CODE § 16-3-20(1)(g) (1976). Larceny and extortion are added to the felony-murder provision of Michigan, MICH. COMP. LAWS ANN. § 750.316 (West Supp. 1977-1978), and larceny is included in South Carolina, S.C. CODE § 16-3-20(1)(f) (1976), and Tennessee, TENN. CODE ANN. § 39-2402(4) (1975).

¹⁹ There are 25 jurisdictions that include kidnapping as an enumerated felony. It is the only predicate added to arson, rape, robbery and burglary in Mississippi. MISS. CODE ANN. § 97-3-19(2)(e) (Supp. 1977) (five enumerated felonies for capital murder). Felonious restraint is an added predicate in North Dakota. N.D. CENT. CODE § 12.1-16-01(3) (1976). Vehicular piracy serves as a predicate for capital murder in Arkansas. ARK. STAT. ANN. § 41-1501(1)(a) (1977). Air piracy and hijacking have been introduced as predicate felonies in a few recent statutes. See notes 24-25 and accompanying text *infra*.

of a child,²¹ sodomy,²² and escape.²³ Recent additions to the statutory predicates are air piracy,²⁴ hijacking,²⁵ extortion,²⁶ use of a bomb,²⁷ and distribution of narcotics.²⁸ Included among the predicate felonies are crimes which may arguably be without inherent danger to human life, such as storehouse breaking²⁹ and burning of a barn or tobacco house.³⁰ Where legislatures have created such questionable predicates, it would appear to be fundamentally unfair to utilize such means to elevate a homicide to murder.³¹

In those jurisdictions accepting the common law standard for establishing whether a homicide occurring in the course of a particular unlawful act may be the subject of a felony-murder indictment,³² the courts must determine whether the underlying felony was "inherently dangerous." While California courts, which have created a somewhat controversial³³

²⁰ Mayhem is included in the provision of Arizona, ARIZ. REV. STAT. ANN. § 13-452 (Supp. 1957-1977); California, CAL. PENAL CODE § 189 (West Supp. 1978); District of Columbia, D.C. CODE § 22-2401 (1973); Idaho, IDAHO CODE §§ 18-4003, -4006(2) (Supp. 1977); and Maryland, MD. ANN. CODE art. 27, § 410 (1977).

²¹ Molestation of a child is one of the enumerated felonies in Arizona, ARIZ. REV. STAT. ANN. § 13-452 (Supp. 1957-1977); California, CAL. PENAL CODE § 189 (West Supp. 1978); and Nevada, NEV. REV. STAT. § 200.030(1)(b) (1977).

²² See note 18 *supra*.

²³ Escape is among the listed predicates in 11 states. See ARK. STAT. ANN. § 41-1501(1)(a) (1977); CONN. GEN. STAT. ANN. § 53a-54c (West Supp. 1977); DEL. CODE tit. 11, § 636(a)(7) (Supp. 1977); LA. REV. STAT. ANN. § 14:30.1 (West Supp. 1978); MD. ANN. CODE art. 27, § 410 (1977); MONT. REV. CODES ANN. § 94-5-102(1)(b) (Supp. 1976); N.Y. PENAL LAW § 125.25(3) (McKinney 1975); N.D. CENT. CODE § 12.1-16-01(3) (1976); OHIO REV. CODE ANN. § 2903.01(b) (Page 1975); OKLA. STAT. ANN. tit. 21, § 701.7(B) (West Supp. 1976-1977); OR. REV. STAT. § 163.115(1)(b) (1975). Resisting arrest is specifically added in Rhode Island. R.I. GEN. LAWS § 11-23-1 (Supp. 1978).

²⁴ Florida and Tennessee have included air piracy in their felony-murder provisions. See FLA. STAT. ANN. § 782.04(1)(a) (West Supp. 1978); TENN. CODE ANN. § 39-2402(4) (1975).

²⁵ See NEB. REV. STAT. § 28-303 (1977).

²⁶ See MICH. COMP. LAWS ANN. § 750.316 (Supp. 1977-1978).

²⁷ See FLA. STAT. ANN. § 782.04 (West Supp. 1978); TENN. CODE ANN. § 39-2402 (1975).

²⁸ Distribution of narcotics is among the listed felonies in Florida. FLA. STAT. ANN. § 782.04 (West Supp. 1978). The use of this predicate has stirred some controversy in light of the difficulty in establishing proximate cause. See *State v. Dixon*, 109 Ariz. 441, 511 P.2d 623 (1973), discussed in Comment, *Prospective Homicidal Responsibility for the Heroin Dealer in Arizona*, 1975 ARIZ. ST. L.J. 97, 106-09.

²⁹ MD. ANN. CODE art. 27, § 410 (1977).

³⁰ *Id.* § 409.

³¹ See, e.g., *People v. Satchell*, 6 Cal. 3d 28, 489 P.2d 1361, 98 Cal. Rptr. 33 (1971) (en banc), wherein the Supreme Court of California refused to apply the felony-murder doctrine to the felony of possession of a sawed-off shotgun. The court found it difficult "to understand how any offense of mere passive possession can be considered to supply the element of malice in a murder prosecution." *Id.* at 43, 489 P.2d at 1371, 98 Cal. Rptr. at 43.

³² In addition to the states listed in note 14 *supra*, California and Arizona courts have created a second-degree felony-murder rule based upon the common law. See *Kinsey v. State*, 49 Ariz. 201, 65 P.2d 1141 (1937); *People v. Ford*, 60 Cal. 2d 772, 388 P.2d 892, 36 Cal. Rptr. 620 (1964).

³³ See note 32 *supra*. See generally Comment, *The California Doctrine of Felony Murder: An Enigma Wrapped Up In a Riddle*, 7 U.W.L.A.L. REV. 150 (1975), wherein it is suggested that the lack of statutory authority for second-degree felony-murder should bar its application.

common law felony-murder rule under that state's second degree homicide statute,³⁴ look to the elements of a felony "*in the abstract* [and] *not . . . to the specific facts of the case*,"³⁵ most courts consider both the nature of the felony and the circumstances of its commission to be relevant to whether there is inherent danger in the commission of the crime.³⁶ Where the circumstances of the commission of the felony are to be considered, the desirability of definitive statutory guidelines is apparent. If the rule was applied to all felonies which were committed under circumstances which create a risk of death, it would be very easy to find that risk where death, in fact, was the result. Since application of the felony-murder doctrine can eliminate mens rea as an element necessary for conviction, thus precluding use of defenses associated with that element,³⁷ it seems appropriate to limit its use to situations in which, in objective terms, the "inherent danger" ascribed to the intended felony is sufficient to justify the transfer of intent from felony to homicide.

Felony-Murder as a Lesser Degree of Homicide

Those jurisdictions that seek to establish culpability as the standard for the fixing of criminal liability, but are unwilling to abolish constructive malice altogether, are able to accomplish their goal by lessening the degree of homicide—and thereby the degree of punishment—associated with felony-murder. In Alaska, felony-murder not purposely or maliciously committed is considered manslaughter,³⁸ and, in Ohio, homicide occurring in the course of a nonenumerated felony is deemed involuntary manslaughter.³⁹ Maine and Wisconsin statutes have reduced felony-murder to third degree homicide,⁴⁰ and four states give felony-murder the status

³⁴ CAL. PENAL CODE § 189 (West Supp. 1978).

³⁵ *People v. Satchell*, 6 Cal. 3d 38, 39-40, 489 P.2d 1361, 1369, 98 Cal. Rptr. 33, 41 (1971) (emphasis in original).

³⁶ See *Jenkins v. State*, 230 A.2d 262, 269 (Del.), *aff'd*, 395 U.S. 213 (1969) (doctrine should apply only to felonies "which are, by nature or circumstances, foreseeably dangerous to human life"). See also *People v. Golson*, 32 Ill. 2d 398, 207 N.E.2d 68, *cert. denied*, 384 U.S. 1023 (1966) (theft from United States mail by stealth inherently dangerous); *State v. Chambers*, 524 S.W.2d 826 (Mo. 1975) (en banc), *cert. denied*, 423 U.S. 1058 (1976) (car theft inherently dangerous); *State v. Williams*, 284 N.C. 67, 199 S.E.2d 409 (1973) (discharging firearm into occupied property inherently dangerous); *Gore v. Leeke*, 261 S.C. 308, 199 S.E.2d 755 (1973), *cert. denied*, 416 U.S. 958 (1974) (daytime breaking and entering and larceny inherently dangerous).

³⁷ See notes 120-29 and accompanying text *infra*.

³⁸ See ALASKA STAT. §§ 11.15.010-.040 (1970). It has been suggested that the grading of felony-murder as manslaughter was an inadvertent abolition of the rule in that state. See *New Criminal Codes*, *supra* note 15, at 259. The same commentator believes that legislative error was the reason for the lower grading of felony-predicated homicide convictions in Oklahoma, Utah, and Idaho. *Id.* at 259-60.

³⁹ OHIO REV. CODE ANN. § 2903.04(a) (Page 1975). Ohio requires mens rea for a felony-murder conviction. See note 52 and accompanying text *infra*.

⁴⁰ ME. REV. STAT. tit. 17-A, § 203(1) (West Supp. 1977); WIS. STAT. ANN. § 940.03 (West 1958).

of second degree murder.⁴¹ Radical change in the degree of crime charged is a viable alternative to abolition of the rule, since the lesser degree of criminal liability imposed is consistent with the degree of culpability involved.⁴² The public need not fear that felons would thereby escape just treatment if death were to result from an intentional felonious act, since higher degrees of homicide would be charged if the requisite mens rea were present. Malice could still be implied from the commission of an act which is imminently dangerous to life,⁴³ but such malice would remain a required element of the crime, necessitating proof of its existence and permitting the assertion of any applicable defenses.⁴⁴

Requiring a Mens Rea for Felony-Murder

It has been said that the felony-murder rule is crucial to a murder conviction only in two cases: when an unforeseeable, accidental death occurs in the course of a felony; and, when the state seeks to establish vicarious criminal liability for death caused by an accomplice or a third party.⁴⁵ In other homicides, since the requisite mens rea is amenable to proof, the rule is not essential to the establishment of criminal liability; in such cases it serves only to present an accused with procedural obstacles to his defense.⁴⁶

The American Law Institute, in its Model Penal Code, recommends that a mens rea be required for all felony-murder prosecutions.⁴⁷ The Code provision, which represents a compromise between the drafters' ardent desire to abolish the felony-murder doctrine⁴⁸ and the realization on their part that conservative legislatures would balk at such drastic action,⁴⁹ creates a rebuttable presumption of recklessness if the actor is engaged in,

⁴¹ LA. REV. STAT. ANN. § 14:30.1 (West Supp. 1978); N.H. REV. STAT. ANN. § 630:1-b(I)(b) (1974); N.Y. PENAL LAW § 125.25(3) (McKinney 1975); 18 PA. CONS. STAT. ANN. § 2502(b) (Purdon Supp. 1977-1978).

⁴² See *Anachronism*, *supra* note 1, at 432-35.

⁴³ See Prevezer, *supra* note 4, at 625.

⁴⁴ The elimination of defenses relating to mens rea is one reason for strong criticism of the felony-murder doctrine. See note 120 and accompanying text *infra*.

⁴⁵ See, e.g., Ludwig, *Foreseeable Death in Felony Murder*, 18 U. PITT. L. REV. 51, 52 (1956); Crum, *Causal Relations and the Felony-Murder Rule*, 1952 WASH. U.L.Q. 191, 203-09.

⁴⁶ See notes 120-29 and accompanying text *infra*.

⁴⁷ MODEL PENAL CODE § 210.2(1) (Prop. Official Draft 1962).

⁴⁸ See MODEL PENAL CODE § 201.2, Comment 4 (Tent. Draft No. 9, 1959).

⁴⁹ See Denzer, *supra* note 4, at 260; Wechsler, *supra* note 4, at 1446. Denzer indicates that elimination of the felony-murder rule in New York would be "drastic" in view of the fact that "[p]ractically every jurisdiction in this country accepts the felony murder doctrine." Denzer, *supra* note 4, at 260. Acknowledging that there is "something to be said for" determining punishment based on culpability and that New York's felony-murder statute bases punishment on the result (retribution), Denzer, one of the drafters of New York's present penal law, nonetheless defends retention of the provision in view of the political and social climate: "[New York's legislators] would never, at least in these times, have enacted a penal law without the felony murder rule. . . . [A]n era of street crimes and riots . . . has caused the legislature to stiffen its back." *Id.* (emphasis added).

or is an accomplice to, the commission of, the attempted commission of, or flight after the commission of certain enumerated felonies.⁵⁰ At present, New Hampshire is the only state to have adopted similar statutory language.⁵¹

Alaska and Ohio require that the homicide be caused "purposely" to constitute murder.⁵² Delaware requires recklessness or criminal negligence.⁵³ Texas' felony-murder statute applies only when, in the course of and in furtherance of a felonious purpose, the defendant commits an act "clearly dangerous to human life" that causes death.⁵⁴ In Tennessee, the killing must be "willfull [sic], deliberate and malicious" in order to constitute felony-murder.⁵⁵

In several states, the fact that a homicide occurred during the course of a felony may have the effect of raising the crime to a capital offense where the requisite mental culpability can be proved by other means.⁵⁶

⁵⁰ The statute provides:

(1) Except as provided in Section 210.3(1)(b), criminal homicide constitutes murder when:

(a) it is committed purposely or knowingly; or

(b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.

MODEL PENAL CODE § 210.2 (Prop. Official Draft 1962).

The creation of a rebuttable presumption, which places the burden of going forward with evidence on the defendant, is seen by some as transforming a rule of law into a rule of evidence. See *New Criminal Codes*, *supra* note 15, at 261. This approach raises constitutional questions in light of *In re Winship*, 397 U.S. 358 (1970), wherein the Supreme Court held that due process requires that each element of a particular crime charged must be proved beyond a reasonable doubt in order to support a conviction. But see notes 108-19 and accompanying text *infra*. In the event the presumption is rebutted, the defendant could be found guilty of manslaughter.

⁵¹ New Hampshire's second-degree murder statute provides that a defendant will be subject to punishment of life imprisonment if he recklessly causes death "under circumstances manifesting an extreme indifference to the value of human life." Recklessness is presumed "if the actor causes the death by the use of a deadly weapon in the commission of, or in an attempt to commit, or in immediate flight after committing or attempting to commit any class A felony." N.H. REV. STAT. ANN. § 630:1-b(I)(b) (1974).

In addition, a person may be found guilty of first degree murder, punishable by life imprisonment with no parole, if he "[k]nowingly causes the death of . . . [a]nother before, after, while engaged in the commission of, or while attempting to commit robbery or burglary while armed with a deadly weapon, the death being caused by the use of such weapon." N.H. REV. STAT. ANN. § 630:1-a (1974).

⁵² See ALASKA STAT. § 11.15.010 (1970); OHIO REV. CODE ANN. § 2903.01(B) (Page 1975).

⁵³ See DEL. CODE tit. 11, § 636(a)(2), (6). Recklessness in the course of and in furtherance of any felony may be a predicate, but criminal negligence is sufficient only for deaths caused in the course and furtherance of enumerated felonies of rape, kidnapping, arson, and robbery. See *id.*

⁵⁴ TEX. PENAL CODE ANN. tit. 5, § 19.02(a)(3) (Vernon 1974).

⁵⁵ TENN. CODE ANN. § 39-2402(4) (1975).

⁵⁶ See ARK. STAT. ANN. § 41-1502 (1975); CONN. GEN. STAT. ANN. § 53a-54b(3) (West Supp.

A requirement of proof of mens rea as a condition precedent to application of a felony-murder rule allows the defendant the benefit of defenses relating to mens rea which would otherwise be precluded.⁵⁷ Such an approach would virtually eliminate the major objectionable feature of the felony-murder rule: that it can be used to create strict criminal liability.

Merger and Double Jeopardy Considerations

There is no double jeopardy involved in convictions for both felony-murder and the underlying felony if the underlying felony is considered a separate and distinct offense.⁵⁸ In some cases, however, the underlying felony is part of a continuous course of conduct culminating in the homicide, as in the case of felonious assault resulting in the victim's death. In this instance, the underlying felony is said to merge into the homicide.⁵⁹ Such circumstances raise difficult questions regarding the validity of dual convictions,⁶⁰ or of use of the felony as predicate for a felony-murder charge.⁶¹

1977); KY. REV. STAT. § 507.020(2)(b) (Supp. 1976); LA. REV. STAT. ANN. § 14:30.1 (West Supp. 1978); MD. ANN. CODE art. 27, § 413b(3) (iii), (iv), (viii) (1976); N.H. REV. STAT. ANN. § 630:1(I)(b) (1974); N.M. STAT. ANN. § 40A-2-1A(3) (1972), TEX. PENAL CODE ANN. tit. 5, § 19.03(a)(2), (b) (Vernon 1974); UTAH CODE ANN. § 76.5-202(1)(d), (2) (Supp. 1975); VA. CODE § 18.2-31(a), (d), (e) (Supp. 1976) (kidnapping, robbery with deadly weapon, rape); WYO. STAT. § 6-54(a), (b) (i)-(x) (Supp. 1975).

⁵⁷ See note 120 and accompanying text *infra*.

⁵⁸ See, e.g., *People v. Fitzpatrick*, 61 Misc. 2d 1043, 308 N.Y.S.2d 18 (Oneida County Ct. 1970); *People ex rel. Santangelo v. Tutuska*, 19 Misc. 2d 308, 192 N.Y.S.2d 350 (Sup. Ct. Erie County 1959), *aff'd mem.*, 11 App. Div. 2d 906, 205 N.Y.S.2d 1006 (4th Dep't 1960), *appeal denied*, 9 N.Y.2d 862, 175 N.E.2d 818, 216 N.Y.S.2d 684 (1961).

Double jeopardy is a consideration, however, where both offenses grew out of the same transaction. See *State ex rel. Glenn v. Klein*, 184 So. 2d 904 (Fla. Dist. Ct. App. 1966); *State v. Mowser*, 92 N.J.L. 474, 106 A. 416 (N.J. 1919).

⁵⁹ See Arent & MacDonald, *The Felony Murder Doctrine and Its Application Under the New York Statutes*, 20 CORNELL L.Q. 288, 298-301 (1935) [hereinafter cited as Arent].

The merger problem did not arise in connection with felony-murder at early common law; since all felonies were punishable by death, it made little difference whether the accused was hanged for committing the felony, the murder, or both. Quinn, *Homicides Under the Colorado Criminal Code*, 49 DEN. L.J. 137, 146 (1972). Another reason that merger did not arise as a problem at common law was that an intent to cause grievous bodily harm, or knowledge that the acts causing death will probably cause such harm, was in itself sufficient mens rea for the killing to constitute murder. Only in states such as New York, where the legislature by statute has attempted precisely to define offenses such as manslaughter and murder, is the merger problem significant, since application of the felony-murder rule may act to change the degree of homicide which may be charged. See Arent, *supra* at 299.

⁶⁰ See Busch & Fulgoni, *Diminished Capacity Applied to the Felony-Murder Rule*, 47 L.A. B. BULL. 291, 295-96 (1972) [hereinafter cited as Busch]; Note, *The California Supreme Court Assaults the Felony-Murder Rule*, 22 STAN. L. REV. 1059, 1060-61 (1970); Comment, *Merger and the California Felony-Murder Rule*, 20 U.C.L.A. L. REV. 250, 285-86 (1972) [hereinafter cited as *California Felony-Murder Rule*]. See also *State v. Thompson*, 280 N.C. 202, 185 S.E.2d 666 (1972).

⁶¹ See, e.g., *People v. Wilson*, 1 Cal. 3d 440, 462 P.2d 22, 82 Cal. Rptr. 494 (1969) (en banc) (burglary with intent to commit assault not a valid predicate); *People v. Ireland*, 70 Cal. 2d

The double jeopardy clause⁶² bars conviction of the predicate felony after a conviction of felony-murder when it was necessary to prove the underlying felony in order to establish the requisite mens rea for a murder conviction. In *Harris v. Oklahoma*,⁶³ for example, the Supreme Court reversed a conviction for armed robbery because the defendant has previously been convicted of a murder occurring in the course of the robbery. In this case, proof of all the elements of the felony was a prerequisite to a conviction for felony-murder.⁶⁴ The double jeopardy clause does not actually lessen the impact of a felony-murder charge upon a defendant, for he still is liable for murder. It does, however, accord with the underlying principle of the merger doctrine that a felon should not suffer double punishment for action which should only constitute a single crime.

The merger doctrine provides that a felony may serve as the predicate for a felony-murder charge only if it is established that there was an intent to commit the felony which did not constitute intent to harm the victim.⁶⁵ Furthermore, specific intent to commit the underlying felony may be required for a murder conviction, even though general intent would be sufficient for a conviction of the felony itself.⁶⁶ This aspect of merger is not universally applied; in some states it is possible to predicate a felony-murder conviction on such general intent crimes as unlawful possession of a firearm.⁶⁷

To aid in determining the appropriateness of a felony-murder charge, California courts have adopted an "included in fact" test, which takes into

522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969) (assault with a deadly weapon an improper predicate). But see *Barker v. State*, 233 Ga. 781, 213 S.E.2d 624 (1975) (aggravated assault an allowable predicate for felony-murder conviction).

⁶² U.S. CONST. amend. V provides in pertinent part: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb."

⁶³ 433 U.S. 682 (1977) (per curiam).

⁶⁴ *Id.* A companion of the defendant had killed a store clerk during the robbery. The Oklahoma Court of Criminal Appeals noted that "[i]n a felony murder case, the proof of the underlying felony is needed to prove the intent necessary for a felony murder conviction." *Harris v. State*, 555 P.2d 76, 80-81 (Okla. Crim. App. 1976). That court nevertheless affirmed the defendant's conviction for robbery despite his prior conviction for felony-murder.

The Supreme Court, in a per curiam opinion, held that "[w]hen, as here, conviction for a greater crime, murder, cannot be had without conviction for the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction for the greater one." 433 U.S. at 683 (citing *In re Nielsen*, 131 U.S. 176 (1889)).

⁶⁵ See *Arent*, *supra* note 59, at 298. In *People v. Ireland*, 70 Cal. 2d 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969) (en banc), the California Supreme Court refused to allow assault with a deadly weapon to predicate a felony-murder conviction:

To allow such use of the felony-murder rule would effectively preclude the jury from considering the issue of malice aforethought in all cases wherein homicide has been committed as a result of a felonious assault—a category which includes the great majority of all homicides. This kind of bootstrapping finds support neither in logic nor in the law.

Id. at 536, 450 P.2d at 590, 75 Cal. Rptr. at 198.

⁶⁶ See *Busch*, *supra* note 60, at 294-95.

⁶⁷ See *State v. Moffitt*, 199 Kan. 514, 431 P.2d 879 (1967).

account the relationship between actus reus and intent. Under this approach, a felony may not operate as the predicate for a felony-murder charge if it is included in the act which causes death—if there is actually only one continuous act culminating in death.⁶⁸

While the merger doctrine acts in most instances to protect the rights of the defendant, its application under certain circumstances may produce an anomalous result. For instance, a person may be charged with felony-murder in connection with a death occurring in the course of a burglary only if the defendant did not enter the house for the purpose of assaulting or killing the victim. Thus, illegal entry for the sole purpose of stealing property may be a valid predicate for a felony-murder charge, while illegal entry for the purpose of inflicting harm on the victim would merge in the ensuing homicide.⁶⁹

Despite the anomaly which may be created by such an application of the merger doctrine, the rule provides important safeguards for one accused of murder in the course of a lesser-included felony.⁷⁰ Use of the felony-murder rule in such instances would allow conviction without proof of the mens rea requisite for an intentional murder conviction; the merger doctrine requires that the issue of mens rea be placed before the jury.

Limiting Vicarious Liability Under the Felony-Murder Rule.

The most criticized use of the felony-murder rule is the imposition of criminal liability upon a felon for the death of a third party or cofelon caused by the act of a cofelon or third party.⁷¹ Many jurisdictions impose

⁶⁸ See, e.g., *People v. Ford*, 60 Cal. 2d 772, 388 P.2d 892, 36 Cal. Rptr. 620, cert. denied, 377 U.S. 940 (1964); *People v. Chavez*, 37 Cal. 2d 656, 234 P.2d 632 (1952). See also Comment, *Taming the Felony-Murder Rule*, 14 SANTA CLARA LAW. 97, 99 (1973); *California Felony-Murder Rule*, supra note 60, at 253 & n.16 (1972).

⁶⁹ See, e.g., *People v. Wilson*, 1 Cal. 3d 431, 462 P.2d 22, 82 Cal. Rptr. 494 (1969) (en banc), wherein the California Supreme Court reversed a murder conviction based upon felonious entry with intent to commit assault with a deadly weapon. The court condemned as "bootstrapping" an approach whereby an entry, which was felonious only because there was present an intent to assault, could serve as a predicate for murder, even though the assault was an integral part of the homicide. *Id.* at 440-41, 462 P.2d at 28-29, 82 Cal. Rptr. at 500. One commentator suggests that the court's reasoning is that:

[S]ince the purpose of the felony-murder rule is to deter felons from killing, a felon who enters a dwelling to kill or who uses a weapon for that purpose is in no way deterred by the rule. . . . This differs from the situation in which a robber, whose prime objective is money, is faced with a decision as to whether or not to eliminate possible witnesses to the robbery.

Busch, supra note 60, at 295. It is submitted that the rule need not be applied in either situation, since intent to kill may be readily shown.

⁷⁰ See Busch, supra note 60, at 295.

⁷¹ See, e.g., Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50 (1956); Note, *Limitations on the Applicability of the Felony-Murder Rule in California*, 22 HASTINGS L.J. 1327, 1345 (1971); Note, *Criminal Liability of a Participant in Crime for the Death of a Fellow Participant*, 22 SYRACUSE L. REV. 1065 (1971).

Various case comments have assailed application of the felony-murder rule on a proxi-

some limitations—either statutory or judicial in nature—on vicarious liability for felony murder.

Killing Must Be "in Furtherance of" the Felony

While the classic application of the felony-murder rule is its use to impose liability upon a felon when a death occurs in the course of a felonious act, the rule has received expansive treatment in many statutes so as to extend to deaths occurring in the course of attempted felonies,⁷² as well as in the course of flight from felonies or attempted felonies.⁷³ Some legislatures, however, have elected to limit application of the rule to deaths caused by an act done *in furtherance of* the felonious intent.⁷⁴ Relatively

mate cause theory in cases of vicarious liability. See, e.g., 52 CHI.-KENT. L. REV. 184 (1975) (discussing *People v. Hickman*, 59 Ill. 2d 89, 319 N.E.2d 511 (1974), cert. denied, 421 U.S. 913 (1975)); 74 DICK. L. REV. 756 (1970) (discussing *Commonwealth ex rel. Smith v. Myers*, 438 Pa. 218, 261 A.2d 550 (1970)); 74 W. VA. L. REV. 204 (1971) (discussing *Taylor v. Superior Court*, 3 Cal. 3d 578, 477 P.2d 131, 91 Cal. Rptr. 275 (1970) (en banc)).

⁷² See ALA. CODE tit. 14, § 314 (1959); ALASKA STAT. § 11.15.010 (1970); ARIZ. REV. STAT. ANN. § 13-452 (Supp. 1957-1977); ARK. STAT. ANN. §§ 41-1501(1)(a), -1502(1)(a) (1977); CAL. PENAL CODE § 189 (West Supp. 1978); COLO. REV. STAT. § 18-3-102(1)(b) (Supp. 1976); CONN. GEN. STAT. ANN. § 53a-54c (West Supp. 1977); DEL. CODE tit. 11, § 636(a)(2), (6), (7) (Supp. 1977); D.C. CODE § 22-2401 (1973); FLA. STAT. ANN. § 782.04(1)(a) (West Supp. 1978); IDAHO CODE §§ 18-4003, -4006(2) (Supp. 1977); ILL. ANN. STAT. ch. 38, § 9-1(a)(3) (Smith-Hurd Supp. 1977); IND. CODE ANN. § 35-42-1-1(a)(2) (Burns Supp. 1977); IOWA CODE ANN. § 690.2 (West Supp. 1977-1978); KAN. STAT. § 21-3401 (1974); LA. REV. STAT. ANN. § 14:30.1 (West Supp. 1978); MD. ANN. CODE art. 27, § 410 (1977); MASS. GEN. LAWS ANN. ch. 265, § 1 (West 1970); MICH. COMP. LAWS ANN. § 750.316 (Supp. 1977-1978); MINN. STAT. ANN. §§ 609.185(2), .195 (West 1978); MISS. CODE ANN. § 97-3-19(1)(c), (2)(e) (Supp. 1977); MONT. REV. CODES ANN. § 94-5-102(1)(b) (1977); NEB. REV. STAT. § 28-303 (1977); NEV. REV. STAT. § 200.030(1)(b) (1977); N.H. REV. STAT. ANN. §§ 630:1-a(I)(b)(1) to (3), -b(I)(b) (1974); N.J. STAT. ANN. § 2A:113-1 (West Supp. 1977-1978); N.M. STAT. ANN. § 40A-2-1(A)(3) (1972); N.Y. PENAL LAW § 125.25(3) (McKinney 1975); N.C. GEN. STAT. § 14-17 (Supp. 1977); N.D. CENT. CODE § 12.1-16-01(3) (1976); OHIO REV. CODE ANN. § 2903.01(B), .04(A) (Page 1975); OR. REV. STAT. § 163.115(1)(b) (1975); 18 PA. CONS. STAT. ANN. § 2502(b), (d) (Purdon Supp. 1977-1978); R.I. GEN. LAWS § 11-23-1 (Supp. 1978); TEX. PENAL CODE ANN. tit. 5, § 19.02(a)(3) (Vernon 1974); UTAH CODE ANN. §§ 76-5-202(1)(d), -203(1)(d) (1977); VT. STAT. ANN. tit. 13, § 2301 (1974); VA. CODE § 18.2-32 (Supp. 1977); WASH. REV. CODE ANN. § 9A.32.030(1)(c) (1977); W. VA. CODE § 61-2-1 (1977); WIS. STAT. ANN. § 940.03 (West 1958); WYO. STAT. ANN. § 6-54(a) (Supp. 1975).

⁷³ ARK. STAT. ANN. §§ 41-1501(1)(a), -1502(1)(a) (1977); COLO. REV. STAT. ANN. § 18-3-102(1)(b) (Supp. 1976); CONN. GEN. STAT. ANN. § 53a-54c (West Supp. 1977); DEL. CODE tit. 11, § 636(a)(2), (6), (7) (Supp. 1977); MONT. REV. CODES ANN. § 94-5-102(1)(b) (1977); N.H. REV. STAT. ANN. § 630:1-b(I)(b) (1974); N.Y. PENAL LAW § 125.25(3) (McKinney 1975); N.D. CENT. CODE § 12.1-16-01(3) (1976); OHIO REV. CODE ANN. § 2903.01(B) (Page 1975); OR. REV. STAT. § 163.115(1)(b) (1975); 18 PA. CONS. STAT. ANN. § 2502(b)(d) (Purdon Supp. 1977-1978); TEX. PENAL CODE ANN. tit. 5, § 19.02(a)(3) (Vernon 1974); UTAH CODE ANN. §§ 76-5-202(1)(d), -203(1)(d) (1977); WASH. REV. CODE ANN. § 9A.32.030(c) (1977).

⁷⁴ See ARK. STAT. ANN. §§ 41-1501(1)(a), -1502(1)(a) (1977); COLO. REV. STAT. § 18-3-102(1)(b) (Supp. 1976); CONN. GEN. STAT. ANN. § 53a-54c (West Supp. 1977); DEL. CODE tit. 11, § 636(a)(2), (6), (7) (Supp. 1977); N.Y. PENAL LAW § 125.25(3) (McKinney 1975); N.D. CENT. CODE § 12.1-16-01(3) (1976); OR. REV. STAT. § 163.115(1)(b) (1975); TEX. PENAL CODE ANN. tit. 5, § 19.02(a)(3) (Vernon 1974).

few state legislatures have so acted, however. The limitation of criminal liability in this manner is primarily within the province of the courts.⁷⁵

Although criminal liability may be established upon a showing of proximate cause between the commission of the felony and death, the common law applies an "agency theory" to vicarious liability for felony-murder.⁷⁶ Although some controversial California cases, as well as a recent Illinois decision, held that a showing of proximate cause is sufficient to uphold convictions for felony-murder,⁷⁷ the trend in most jurisdictions has been to utilize the agency theory which requires that the act causing death be done in furtherance of the common felonious design.⁷⁸

There are two widely recognized exceptions to application of the agency theory of vicarious liability: (1) when the victim is used as a "shield" by the felon or a cofelon;⁷⁹ and (2) when death occurs as a result of a gun battle initiated or engaged in by the felon or a cofelon.⁸⁰ In these situations, the agency test is disregarded in favor of the assumption that proximate cause is sufficient to establish criminal liability.⁸¹ At least one commentator has noted that the felony-murder rule is an unnecessary tool for the establishment of liability in those situations contemplated by these

⁷⁵ See, e.g., Comment, *Taming the Felony-Murder Rule*, 14 SANTA CLARA LAW. 97, 99 (1973). Such a restriction has as its primary effect the limitation of vicarious liability. One commentator discusses judicial limitation: "Restrictions upon the application of the felony-murder doctrine are common in nearly all jurisdictions because a broad interpretation of the provision would obviously produce harsh results." 25 ALB. L. REV. 153, 156 (1961). See also Note, *Limitations on the Applicability of the Felony-Murder Rule in California*, 22 HASTINGS L.J. 1327, 1347-48 (1971), wherein the author, in discussing *Taylor v. Superior Court*, 3 Cal. 3d 578, 477 P.2d 131, 91 Cal. Rptr. 275 (1970) (en banc), criticizes the decision on the ground that "the *Taylor* court has made the felony-murder rule applicable to defendants who have done no more than commit the underlying felony." *Id.* at 1348. See note 77 and accompanying text *infra*.

⁷⁶ For a discussion of the common law agency approach, see *People v. Wood*, 8 N.Y.2d 48, 51-53, 167 N.E.2d 736, 738-39, 201 N.Y.S.2d 328, 331-33 (1960), wherein the New York Court of Appeals outlined the early American view which adhered to the agency theory of liability.

⁷⁷ See, e.g., *Taylor v. Superior Court*, 3 Cal. 3d 578, 477 P.2d 131, 91 Cal. Rptr. 275 (1970) (en banc), discussed in 74 W. VA. L. REV. 204 (1971); *People v. Stamp*, 2 Cal. App. 3d 203, 82 Cal. Rptr. 598 (1969), cert. denied, 400 U.S. 819 (1970), discussed in 24 ARK. L. REV. 342 (1970); *People v. Hickman*, 59 Ill. 2d 89, 319 N.E.2d 511 (1974), discussed in 52 CHI.-KENT L. REV. 184 (1975).

⁷⁸ See 52 CHI.-KENT L. REV. 184, 195 & n.55 (1975). The agency theory was firmly established at common law. See, e.g., *Commonwealth v. Campbell*, 89 Mass. (7 Allen) 541, 543 (1863). In *Campbell*, rioters were charged with felony-murder for the death of fellow rioters killed by law officers resisting the mob. While finding that "a person engaged in the commission of an unlawful act is legally responsible for all the consequences which may naturally or necessarily flow from it," *id.*, the court held that application of the rule under the facts presented would be "extraordinary." *Id.* at 545-46.

⁷⁹ For an example of a "shield" case, see *Taylor v. State*, 41 Tex. Crim. 564, 55 S.W. 961 (1900).

⁸⁰ For examples of "gun battle" cases, see *Hornbeck v. State*, 77 So. 2d 876 (Fla. 1955); *People v. Podolski*, 332 Mich. 508, 52 N.W.2d 201 (1952).

⁸¹ Comment, *The Felony-Murder Doctrine Under the Oregon Criminal Code of 1971*, 51 ORE. L. REV. 603, 609 (1972).

exceptions.⁸² In both the shield and gun battle cases, both actus reus and mens rea may be established independently, without resort to the felony predicate, *i.e.*, the holding of the victim as a shield or the initiation of a gun battle arguably constitutes sufficient actus reus, and the cognizance and conscious disregard of a grave risk of death created by such an act arguably is sufficient mens rea to support a murder conviction.⁸³

In view of the particularly harsh results achieved in instances of transferred intent, which obviates the necessity for the prosecution to establish proof of either actus reus or mens rea, a handful of states statutorily restrict use of the felony-murder rule to cases in which death is caused by a felon or cofelon.⁸⁴ In this manner, these jurisdictions avoid a situation in which the act of a third party is imputed to the accused. Four of these states,⁸⁵ along with one other,⁸⁶ require that the victim be a nonfelon.

Establishing an Affirmative Defense

In an effort to alleviate some of the harshness inherent in the application of the felony-murder doctrine to accomplice liability situations, several states include in their homicide statutes an affirmative defense to a charge of felony-murder.⁸⁷ The affirmative defense established under the New York statute requires a showing that the defendant

(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

(b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.⁸⁸

⁸² *Id.* at 608-09.

⁸³ *See id.*

⁸⁴ The 9 states which include such a limitation in their statutes are Arkansas, ARK. STAT. ANN. § 41-1502(1)(a) (1977); Connecticut, CONN. GEN. STAT. ANN. § 53a-54c (West Supp. 1977); Louisiana, LA. REV. STAT. ANN. § 14:30.1 (West Supp. 1977); Maine, ME. REV. STAT. tit. 17-A, § 202(1) (Spec. Supp. 1977); Mississippi, MISS. CODE ANN. § 97-3-19(1)(c), (2)(e) (Supp. 1977); New York, N.Y. PENAL LAW § 125.25(3) (McKinney 1975); North Dakota, N.D. CENT. CODE § 12.1-16-01(3) (1976); Oregon, OR. REV. STAT. § 163.115(1)(b) (1975); Washington, WASH. REV. CODE ANN. § 9A.32.030(c) (1977).

⁸⁵ Connecticut, New York, Oregon, and Washington include this provision. For specific statute citations, see note 84 *supra*.

⁸⁶ *See* COLO. REV. STAT. § 18-3-102(1)(b) (Supp. 1976).

⁸⁷ *See* ARK. STAT. ANN. §§ 41-1501(2), -1502(2) (1977); COLO. REV. STAT. § 18-3-102(2) (1974); CONN. GEN. STAT. ANN. § 53a-54c (West Supp. 1977); N.Y. PENAL LAW § 125.25 (3) (McKinney 1975); N.D. CENT. CODE § 12.1-16-01(3) (1976); OR. REV. STAT. § 163.115(3) (1975).

⁸⁸ *See* N.Y. PENAL LAW § 125.25(3) (McKinney 1975).

Colorado has enacted the additional requirement that the defendant "[e]ndeavored to disengage himself from the commission of the underlying crime . . . immediately upon having reasonable grounds to believe that another participant is armed with a deadly weapon"⁸⁹

This effort to ameliorate the injustice of applying strict liability standards to an unknowing and unwilling accomplice is recognized realistically to be of little effect, since the burden placed on the defendant is nearly impossible to meet.⁹⁰ It no longer appears, however, that the affirmative defense is subject to any question of constitutional validity, in view of the Supreme Court's recent holdings regarding the allocation of the burden of proving affirmative defenses.⁹¹

CRITICISMS OF THE FELONY-MURDER DOCTRINE

Notwithstanding the significant efforts in many jurisdictions to curtail the harsh effects of the felony-murder rule by statutory and judicial restrictions, its continued existence, at least in some diminished form, is assured. Much of the vigorous criticism directed at the doctrine stems from the fact that the many possible limitations have not been universally adopted,⁹² but some critics find any application of the felony-murder rule, however limited, either unnecessary⁹³ or contrary to the fundamental principles of our legal system.⁹⁴ The basic criticisms made are that: (1) The felony-

⁸⁹ COLO. REV. STAT. § 18-3-102(2)(f) (1974).

⁹⁰ See *New Criminal Codes*, *supra* note 15, at 264. The Oregon Criminal Law Revision Commission acknowledged that "[i]t is not anticipated that this defense will often be successful." ORE. CRIM. L. REV. COMM'N, PROPOSED CRIMINAL CODE § 88, commentary at 87 (Final Draft & Report 1970), *quoted in* Arthur, *Homicide, Assault, Kidnapping and Related Offenses*, 51 ORE. L. REV. 459, 468 (1972).

⁹¹ See note 119 and accompanying text *infra*.

⁹² Cf. 9 MAR. J. OF PRAC. & PROC. 517, 532 (1976) (adoption of vicarious liability standards portends the end of efforts to apply the doctrine strictly).

⁹³ It is clear that a felon may be said to have intended the natural and probable consequences of his act. Therefore, intent can be inferred from perpetration of a felony involving a high risk of death or serious injury. See *Anachronism*, *supra* note 1, at 434. It has been argued that in most cases in which a murder conviction is obtained, sufficient intent may be inferred to obviate the need for a resort to the felony-murder rule. See Comment, *Felony Murder in Illinois*, 1974 U. ILL. L.F. 685, wherein the author states: "If the circumstances show, as they often do, that the defendant's actions indicated an intent to kill or knowledge of the probability of death, the defendant could be convicted of murder [without charging felony murder]." *Id.* at 693.

⁹⁴ See Hippard, *supra* note 1, at 1040, wherein the author states that "[s]trict liability crimes are alien to our criminal law and to our Constitution; they are unconstitutional anomalies that the Supreme Court should have suppressed long ago." *Id.*

Another commentator makes clear that use of the felony-murder rule in those jurisdictions which do not apply the common law definition of murder is even more alien to the principle of criminal liability based on culpability since those jurisdictions ordinarily impose a higher degree of liability for the crime than would be the case at common law:

[U]nlike the relation of constructive malice to common law murder, felony murder broadens the scope of first degree murder by supplying proof of a mental state in law that may not exist in fact. . . . [T]his . . . undermines the principle of culpability

murder rule has outlived its purpose; (2) Vicarious liability stretches the rule too far; (3) Relieving the prosecution from the burden of proving the element of intent is unconstitutional; and (4) Unjust procedural advantages are given to the prosecution.⁹⁵

The Felony-Murder Rule Has Outlived Its Purpose

The felony-murder rule was developed at a time when retribution was regarded as an important goal in setting the appropriate punishment for the commission of a particular crime.⁹⁶ Indeed, it is "well-suited to a retributive system of punishment,"⁹⁷ since it allows imposition of a stiff penalty on one who personally or vicariously contributes to the death of another, regardless of intent. As a modern theory of punishment, however, retribution claims a number of justifications which simply do not appear sufficient to sanction the automatic imposition of liability for murder upon the perpetrator of a nonintentional homicide.⁹⁸ Deterrence, a more appropriate justification for meting out such punishment, is furthered by the felony-murder rule only marginally, if at all. It is axiomatic that one cannot deter negligence.⁹⁹ Where death results from an intentional or reckless act, the rule is not essential to the proof of mens rea. The rule is a necessity, therefore, only to establish criminal liability for negligent or accidental death.¹⁰⁰ Since neither negligence nor accident can be deterred, the felony-murder rule cannot fulfill such a purpose. Holmes suggested that the imposition of more severe punishments for the underlying felonies would be a more effective deterrent.¹⁰¹ More recent commentators suggest that imposition of greater penalties for felonies committed with a dangerous weapon

based on mental state. Accordingly, felony murder should be abolished. *Anachronism*, *supra* note 1, at 432-33. See also note 139 *infra*.

⁹⁵ Other criticisms include the complaint that tort principles such as foreseeability and proximate causality should not be applied to criminal law, see, e.g., 9 DUQ. L. REV. 542, 546 (1971), and that broad extension of the res gestae—to include flight and attempt—includes acts beyond the scope of the felony, see Comment, *The Felony Murder Rule in Ohio*, 17 OHIO ST. L.J. 130, 138 (1956).

⁹⁶ It has frequently been noted that the doctrine "has its origin in the common law during an era when nearly all felonies were punishable by death." *People v. Wood*, 8 N.Y.2d 48, 51, 167 N.E.2d 736, 738, 201 N.Y.S.2d 328, 331 (1960) (citing *People v. Enoch*, 13 Wend. 159, 174-75 (1834)); see note 1 *supra*.

⁹⁷ Comment, *The Felony-Murder Doctrine Under the Oregon Criminal Code of 1971*, 51 ORE. L. REV. 603, 610 (1972).

⁹⁸ For a discussion of retribution as a rationale for the punishment of crime, see S. KADISH & M. PAULSEN, *CRIMINAL LAW AND ITS PROCESSES* 6 (3d ed. 1975).

⁹⁹ For instance, it has been observed that "no evidence whatever supports the assumption that, in some mysterious way, insensitive negligent persons are improved or deterred by their punishment or that of other negligent persons." Hall, *Negligent Behavior Should Be Excluded From Penal Liability*, 63 COLUM. L. REV. 632, 642 (1963).

¹⁰⁰ See Comment, *Felony Murder in Illinois*, 1974 U. ILL. L.F. 685, 693-94. See also Ludwig, *Foreseeable Death in Felony Murder*, 18 U. PITT. L. REV. 51 (1956), wherein the author includes vicarious liability as the only other necessary application of the rule. *Id.* at 51-52.

¹⁰¹ O. HOLMES, *THE COMMON LAW* 57-58 (1881).

would be more appropriate.¹⁰² Both approaches would seek to deter felony-murder by deterring the commission of the felony itself. While this is a noble goal, one undeterred by the penalty for the felony could not be deterred from committing a negligent or accidental death in the course of the felony, and it is submitted that if the penalty for the underlying felony were nearly as harsh as that for murder, the result might be to encourage the killing of the victim to preclude later identification. The better approach is imposition of particularly severe punishment for deaths occurring in the course of a felony for which mens rea is independently established.¹⁰³ This avoids attempting the impossible—deterrence of accident or negligence—and focuses on deterring the felon from further intentional transgression. Such a scheme accords with the modern trend toward establishment of mental culpability as the basis of criminal liability.

Vicarious Liability Creating Strict Liability for Crime Stretches the Felony-Murder Rule Beyond Reason

There are four situations in which the felony-murder rule may operate to establish an accused's criminal liability for the acts of another: (1) death of a cofelon by an act of a cofelon; (2) death of a third party by an act of a third party; (3) death of a cofelon by an act of a third party; and (4) death of a third party by an act of a cofelon. Application of the felony-murder rule in any of these situations is criticized as the imposition of strict liability for crime,¹⁰⁴ except where agency principles establish liability in the death of a third party by the act of a cofelon.¹⁰⁵

The death of a cofelon by his own act or by the act of a cofelon is difficult to justify as a predicate for a felony-murder charge. Vicarious liability ordinarily attaches in felony-murder situations only when the death occurs in furtherance of the common felonious design. It is apparent, however, that in all ordinary instances, the cofelon's assistance may be essential to the successful completion of that design. Therefore, it would seem illogical to conclude that an accidental killing of a cofelon by another cofelon should be cast as an act sufficiently in furtherance of the common felonious design so as to permit application of the agency theory.

The death of a third party by an act of another third party, as in the

¹⁰² See Comment, *The Felony-Murder Doctrine Under the Oregon Criminal Code of 1971*, 51 ORE. L. REV. 603, 610 (1972); Note, *The Felony-Murder Rule—A Re-Examination*, 5 SANTA CLARA LAW. 172, 178-79 (1965).

¹⁰³ In this instance, "[p]robably the most likely person to be deterred from the use of fire-arms or deadly weapons or from resorting to measures of violence is the professional criminal." Prevezer, *supra* note 4, at 649.

¹⁰⁴ See Hippard, *supra* note 1, at 1045.

¹⁰⁵ See, e.g., *People v. Golson*, 32 Ill. 2d 398, 207 N.E.2d 68 (1965), wherein the Supreme Court of Illinois noted that "where two or more persons engage in conspiracy to commit robbery and an offer is murdered . . . each of the conspirators is guilty of murder . . . [U]nless the plan was to kill any person attempting to apprehend the conspirators . . . , the plan would be inane." *Id.* at 402, 207 N.E.2d at 73-74.

case of a police officer mistakenly shooting another police officer or a bystander, may be justifiably imputed to a felon in the case of a gun battle or where the victim was used to shield the felon. In such a case, however, sufficient mens rea may be established by the reckless disregard shown for life, without resort to the felony-murder rule. It is submitted that where the act causing death was not a response to any act of the felon, there should be no finding of proximate cause, and thus no imposition of criminal liability.

The death of a cofelon by an act of a third party is the least justifiable of predicates for a felony-murder indictment, since "[i]t would be irrational to impute a legally justifiable homicide to a participating felon and, by reason of such imputation, change the character of the act from one of justifiable homicide to one of criminal culpability."¹⁰⁶

Even where a third party dies as a result of an act of a cofelon, application of the felony-murder rule would produce arbitrary results. If the act was done intentionally or recklessly in furtherance of the common plan, all felons involved will be criminally responsible for murder without implication of a mens rea by operation of the agency theory.¹⁰⁷ Where felons jointly create a situation which holds a grave risk of death, they may all be found guilty of murder without resort to the felony-murder rule. In contrast, if the homicide was the intentional or reckless act of one felon, performed independently of any common plan, it is appropriate that that party alone be held fully accountable.

Thus, where vicarious liability under the felony-murder doctrine is most readily justifiable, that rule is not essential to the establishment of criminal liability; where its application is necessary for that purpose, it is unjustifiable.

The Conclusive Presumption of Mens Rea in Felony-Murder Is Unconstitutional

In many states, as at common law, the felony-murder statute is considered to embody a statutory conclusive presumption of the mens rea requisite for a murder conviction.¹⁰⁸ Under this formulation, mens rea remains an element of murder; it is proved, however, simply by showing the commission of a felony, and the question of premeditation or the presence of malice aforethought is never actually at issue in the case. It has been argued that the conclusive presumption of mens rea in felony-murder cases

¹⁰⁶ See Quinn, *Homicides Under the Colorado Criminal Code*, 49 DEN. L.J. 137, 148 (1972) (citing Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50 (1956)).

¹⁰⁷ See note 78 and accompanying text *supra*.

¹⁰⁸ See, e.g., *People v. Ketchel*, 71 Cal. 2d 635, 456 P.2d 660, 79 Cal. Rptr. 92 (1969); *People v. Bufkin*, 43 Mich. App. 585, 204 N.W.2d 762 (1972), *aff'd*, 48 Mich. App. 290, 210 N.W.2d 390 (1973); *State v. Jewel*, 473 S.W.2d 734 (Mo. 1971); *State v. Kaufman*, 183 Neb. 817, 164 N.W.2d 469 (1969); *Commonwealth v. Yuknavich*, 448 Pa. 502, 295 A.2d 290 (1972).

is constitutionally invalid in that it does not comport with due process guidelines established by the Supreme Court in relation to statutory presumptions.¹⁰⁹

Over the course of the twentieth century, the Court has upheld statutory presumptions as a valid legislative exercise,¹¹⁰ but this sanction has been tempered by evolving constitutional limitations upon what may be presumed. These limitations have the effect of requiring a significant degree of probability that the element of the crime which is presumed does, in fact, exist.¹¹¹ The Court first reasoned, in regard to a criminal statutory presumption, that it "cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed."¹¹² Subsequent decisions have delineated two possible criteria which apparently have been used by the Court to apply this rational connection test: whether the presumed fact "is more likely than not to flow from the proved fact on which it is made to depend;"¹¹³ and, a "more exacting reasonable-doubt standard normally applicable in criminal cases."¹¹⁴ No holding has yet required sole reliance on a reasonable-doubt standard for evaluating the propriety of a criminal conclusive presumption,¹¹⁵ but it would appear

¹⁰⁹ For an excellent analysis of the felony-murder doctrine as a conclusive presumption, and the argument that due process standards cannot be reconciled with the conclusive presumption of intent to kill, see *Constitutional Limitations*, *supra* note 3.

¹¹⁰ See, e.g., *Mobile, J. & K.C.R.R. v. Turnipseed*, 219 U.S. 35, 43 (1910) (need only be "some rational connection" between what is proved and what is ultimately presumed).

¹¹¹ See *Turner v. United States*, 396 U.S. 398 (1970); *Leary v. United States*, 395 U.S. 6 (1969); *United States v. Gainey*, 380 U.S. 63 (1965); *Tot v. United States*, 319 U.S. 463 (1943); *Yee Hem v. United States*, 268 U.S. 178 (1925).

¹¹² *Tot v. United States*, 319 U.S. 463 (1943). In *Tot*, the Court considered the statutory presumption involved in § 2(f) of the Federal Firearms Act, ch. 850, § 902(f), 52 Stat. 1250 (1938) (repealed 1968), which provided:

It shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received . . . in violation of this Act.

Id. The Supreme Court rejected the Government's contention that the statutory presumption should be permitted to stand if it was found that it was comparatively more convenient for the defendant to produce evidence relating to the presumed fact. Rather, it was thought that this "comparative convenience" standard was merely a corollary to the "rational connection" approach, under which the Court determined that such a presumption violated due process. 319 U.S. at 467, 468.

¹¹³ *Leary v. United States*, 395 U.S. 6, 36 (1968).

¹¹⁴ *Turner v. United States*, 396 U.S. 398, 416 (1970).

¹¹⁵ Although both *Leary* and *Turner* intimated the applicability of a reasonable-doubt standard, in both cases the holding could be grounded upon the less demanding "more likely than not" standard. See *Constitutional Limitations*, *supra* note 3, at 1031-33.

¹¹⁶ See *Constitutional Limitations*, *supra* note 3, at 1034-37, wherein the author argues:

[W]hen a conclusive presumption is operative, the state should have to prove there is no reasonable doubt that the presumed element in truth exists in every case. Where only 0.5 percent of robberies result in murder, is it beyond a reasonable doubt that the

logical to require that the presumption of mens rea flowing from proof of a felony meet a degree of persuasion similar to that required of the element of mens rea in an ordinary murder prosecution—proof of the element beyond a reasonable doubt. Under such an approach, it is doubtful that a sufficient correlation could be demonstrated between the commission of a felony and the intent to kill so as to justify the conclusive presumption of the latter from proof of the former.¹¹⁶

Unfortunately, the argument in support of the constitutional invalidity of this statutory presumption has not been accepted in the courts. Some states avoid the question by characterizing their felony-murder statutes not as conclusive presumptions of mens rea but as a legislative substitution of proof of the felony for intent to kill as an element of the crime of murder.¹¹⁷ The problem can also be avoided by distinguishing the cases in which the constitutional limitations relating to criminal statutory presumptions have been developed from the felony-murder presumption, on the ground that the decided cases deal only with *malum prohibitum* offenses, and the limitations have not extended to crimes which are *malum in se*.¹¹⁸ Long-standing judicial approval of the felony-murder presumption indicates that the doctrine is constitutionally secure, barring a willingness on the part of courts to reconsider the latitude afforded to legislatures to define criminal conduct and prescribe its requisite elements.¹¹⁹

robber in every case intended to kill?

Id. at 1037. See also M. WOLFGANG, PATTERNS IN CRIMINAL HOMICIDE 240-44 (1958), cited in MODEL PENAL CODE § 201.2, Comment 4 (Tent. Draft No. 9, 1959).

¹¹⁷ See, e.g., *Gore v. Leeke*, 261 S.C. 308, 199 S.E.2d 755 (1973), cert. denied, 416 U.S. 958 (1974); *State v. Millette*, 299 A.2d 150 (N.H. 1972). Such conclusions raise another interesting constitutional question in that the utter abolition of mens rea as an element of murder arguably may be regarded as violative of the prohibition of cruel and unusual punishments. U.S. CONST. amend. VIII. The Supreme Court has not, however, articulated any constitutional doctrine of mens rea. For an argument in support of such a doctrine, see *Constitutional Limitations*, *supra* note 3, at 1037-40.

¹¹⁸ See, e.g., *Gore v. Leeke*, 261 S.C. 308, 199 S.E.2d 755 (1973), cert. denied, 416 U.S. 958 (1974).

¹¹⁹ See *Barnes v. United States*, 412 U.S. 837, 844 (1973). See also *Mosby v. State*, 253 Ark. 904, 907, 489 S.W.2d 799, 801 (1973) (felony-murder doctrine "has been part of our law since 1838 and we have no intention of overruling it").

The tension between due process concerns and the legislature's power to prescribe the requisite elements of crime has affected recent developments relating to the constitutionality of affirmative defenses to crimes. In *In re Winship*, 397 U.S. 358 (1970), the Supreme Court first held that in a criminal prosecution, proof of every element of a crime beyond a reasonable doubt is constitutionally mandated. The Court subsequently determined, in *Mullaney v. Wilbur*, 421 U.S. 684 (1975), that the due process clause further requires that, under Maine law, when a defendant attempts to reduce the crime of felonious homicide from murder to manslaughter by raising the mitigating issue of heat of passion on sudden provocation, the prosecution must assume the burden of proof in regard to this issue under the reasonable-doubt standard. Applying the *Winship* rationale, a unanimous Court reviewed the history of the heat of passion defense—which negates malice aforethought—and stated that

the fact at issue here—the presence or absence of the heat of passion on sudden provocation—has been, almost from the inception of the common law of homicide, the

single most important factor in determining the degree of culpability attaching to an unlawful homicide. And . . . the clear trend has been toward requiring the prosecution to bear the ultimate burden of proving this fact.

Id. at 696. The prosecution was thus required to bear the burden of negating the "heat of passion" assertion.

It was generally believed that the *Mullaney* holding sounded the death knell for statutory schemes, such as New York's, see N.Y. PENAL LAW § 125.25(1)(a), (2) (McKinney 1975), which require a criminal defendant in a murder prosecution to bear the burden of proving the mitigating factor of extreme emotional disturbance. See, e.g., *People v. Davis*, 49 App. Div. 2d 437, 376 N.Y.S.2d 266 (4th Dep't 1975); *People v. Woods*, 84 Misc. 2d 301, 375 N.Y.S.2d 750 (Sup. Ct. Queens County 1975); *People v. Balogun*, 82 Misc. 2d 907, 372 N.Y.S.2d 384 (Sup. Ct. Kings County 1975). See also Note, *The Constitutionality of New York's Affirmative Defense of Extreme Emotional Disturbance*, 51 ST. JOHN'S L. REV. 158 (1976). The Supreme Court, however, upheld the New York statutory scheme in *Patterson v. New York*, 432 U.S. 197 (1977).

The *Patterson* Court regarded as relevant the fact that the affirmative defense of extreme emotional disturbance "is a considerably expanded version of the common-law defense of heat of passion on sudden provocation," *id.* at 202, and proceeded to demonstrate that the due process clause would not entirely overwhelm legislative discretion in the formulation of substantive criminal law:

[I]t [does] not necessarily follow that a State must prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or the severity of the punishment. Here, in revising its criminal code, New York provided the affirmative defense of extreme emotional disturbance, a substantially expanded version of the older heat-of-passion concept; but it was willing to do so only if the facts making out the defense were established by the defendant with sufficient certainty. The State was itself unwilling to undertake to establish the absence of those facts beyond a reasonable doubt, perhaps fearing that proof would be too difficult. . . . The Due Process Clause, as we see it, does not put New York to the choice of abandoning those defenses or undertaking to disprove their existence in order to convict of a crime which otherwise is within its constitutional powers to sanction by substantial punishment.

Id. at 207-08.

Although the majority was satisfied that New York had fulfilled the *Winship* mandate that it "prove beyond a reasonable doubt 'every fact necessary to constitute the crime . . . charged,'" *id.* at 206 (citing *In re Winship*, 397 U.S. 358, 364 (1970)), the dissent contended that the extreme emotional disturbance formulation is nothing more nor less than "the modern equivalent of 'heat of passion.'" *Id.* at 220 (Powell, J., dissenting). Concluding, therefore, that *Mullaney* was dispositive, Justice Powell felt the view propounded by the majority served only "to run a constitutional boundary line through the barely visible space that separates Maine's law from New York's." *Id.* at 221. By limiting the *Mullaney* holding to require the prosecution to prove the elements in the definition of the offense—a limitation not apparent on the face of *Mullaney*, see 421 U.S. at 699 n.24 (*Winship* not limited to state's definition of elements of a crime),—Justice Powell feared that the Court would permit "a legislature to shift, virtually at will, the burden of persuasion with respect to any factor in a criminal case, so long as it is careful not to mention the nonexistence of that factor in the statutory language that defines the crime." 432 U.S. at 223 (Powell, J., dissenting).

The majority's response to such criticism was that a narrow viewing of the *Mullaney* decision was appropriate:

There is some language in *Mullaney* that has been understood as perhaps construing the Due Process Clause to require the prosecution to prove beyond a reasonable doubt any fact affecting "the degree of criminal culpability". . . . It is said that such a rule would deprive legislatures of any discretion whatsoever in allocating the burden of proof, the practical effect of which might be to undermine legislative reform of our

An Unjust Procedural Advantage Is Obtained by the Prosecution Under the Felony-Murder Rule

In those cases in which the felony-murder doctrine does not provide the sole ground for a murder conviction—*i.e.*, where the requisite mens rea can be otherwise established—it continues to be a useful tool for prosecutors endeavoring to establish murder. Significant procedural advantages can be gained by predicated an indictment on felony-murder rather than, or in the alternative with, intentional murder. Elimination of the need to prove intent precludes the defendant from raising any defenses relating to mental state. If felony-murder is the only basis for the prosecution's case, *i.e.*, no attempt is made alternatively to prove intentional murder, the defendant's evidence of justification, excuse, or diminished capacity will not be placed before the jury. Moreover, even if intentional murder and felony-murder are charged in the alternative, the jury will be instructed to disregard any evidence relating to these defenses in considering the felony-murder charge.

Another procedural advantage¹²⁰ to be gained by the prosecution relates to proof of the underlying felony. Since the felony-murder rule relieves the prosecution of the burden of proving intent to kill upon a showing that death occurred in the course of the commission of a felony, it would appear logical that the prosecution should have to establish beyond a reasonable doubt that the underlying felony—the substitute for the element of intent—was committed. This is not the case in all instances. In many jurisdictions the prosecution must present some evidence that the underlying felony was committed, but that evidence may be in the form of an uncorroborated confession. Since corroboration of a confession is only required to establish that the crime charged has been committed, a confession of felony-murder will be sufficient to sustain conviction, without additional proof that the underlying felony was committed, so long as there is corroboration of the homicide.¹²¹ This was thought to be due to the fact that

criminal justice system. . . . Carried to its logical extreme, such a reading of *Mullaney* might also, for example, discourage Congress from enacting pending legislation to change the felony-murder rule by permitting the accused to prove by a preponderance of the evidence the affirmative defense that the homicide committed was neither a necessary nor a reasonably foreseeable consequence of the underlying felony. . . . The Court did not intend *Mullaney* to have such far-reaching effect.

Id. at 214 n.15. See also S. 1437, 95th Cong., 1st Sess. 99 (1977), reprinted in *Reform of the Federal Criminal Laws: Hearing Before the Subcommittee on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess., at 9583 (1977), which would provide: "It is an affirmative defense to a prosecution [for felony-murder] that the death was not a reasonably foreseeable consequence of: (1) the underlying offense; or (2) the particular circumstances under which it was committed."

¹²⁰ See Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. PA. L. REV. 50 (1956), wherein the author proclaims that the felony-murder rule should not be applied until lack of justification or excuse is established. *Id.* at 60.

¹²¹ See, e.g., *People v. Cantrell*, 8 Cal. 3d 672, 504 P.2d 1256, 105 Cal. Rptr. 792 (1973); *People v. Doherty*, 28 Ill. 2d 528, 193 N.E.2d 37 (1963); *People v. Crandell*, 270 Mich. 124, 258 N.W.

jurisdictions ordinarily do not require an indictment to state whether it is based on intentional murder or felony-murder, that is, the crime charged is simply murder.¹²²

In New York, however, the form of indictment was recently revised to require allegation of each offense charged in a separate count, and a statement of every element of each crime charged.¹²³ Since this form of indictment appears to remove the logical underpinnings from the common law approach,¹²⁴ it may now be argued that proof of each element of a felony-murder charge, as stated in the indictment, must now be proved beyond a reasonable doubt in New York.¹²⁵ There has, however, been no clear adoption of this interpretation by the New York Court of Appeals, although an opportunity for consideration of the issue was presented in *People v. Murray*.¹²⁶ In *Murray*, a defendant confessed to attempted robbery and a homicide resulting therefrom. He later disclaimed his confession of the robbery, insisting that he had stabbed the victim in self-defense. The robbery count was dismissed at the trial level because of insufficient evidence to corroborate the confession of that crime.¹²⁷ Ironically, the defendant's conviction for felony-murder was upheld by the court of appeals in a 4-3 decision, despite the absence of evidence legally sufficient to convict the defendant of the underlying felony.¹²⁸

224 (1935); *People v. Lytton*, 257 N.Y. 310, 178 N.E. 290 (1931).

¹²² For instance, the New York Court of Appeals observed that "[t]he rule is settled that there is no need to charge in an indictment that the homicide was wrought in the commission of another felony. It suffices to state in the common-law form [of indictment] that the defendant acted 'willfully, feloniously, and with malice aforethought.'" *People v. Lytton*, 257 N.Y. 310, 315, 178 N.E. 290, 292 (1931) (Cardozo, C.J.) (quoting *People v. Giblin*, 115 N.Y. 196, 198, 21 N.E. 1062, 1063 (1889)). The commission of the felony thus constituted only the element of mens rea, and did not require independent corroboration. Rather, the defendant had been charged only with the crime of homicide, and "the fact that a homicide has been committed is proved, without reference to a confession by the testimony of eyewitnesses as well as by the discovery of the body, bearing tokens of a fatal wound." *Id.* at 313-14, 178 N.E. at 291.

¹²³ N.Y. CRIM. PROC. LAW § 200.50 (McKinney Supp. 1977-1978) (effective 1971).

¹²⁴ See note 123 and accompanying text *supra*.

¹²⁵ *Id.*

¹²⁶ 40 N.Y.2d 327, 353 N.E.2d 605, 386 N.Y.S.2d 691 (1976).

¹²⁷ *Id.* at 330-31, 353 N.E.2d at 607-08, 386 N.Y.S.2d at 694.

¹²⁸ The three-judge plurality in *Murray* construed N.Y. CRIM. PROC. LAW § 60.50 (McKinney 1971), which states "A person may not be convicted of any offense solely upon evidence of a confession or admission made by him without additional proof that the offense charged has been committed." The plurality determined that the confession corroboration statute was intended to require proof of the corpus delicti and thus necessitated no more than proof that a loss (i.e., homicide) occurred and that it was the result of human agency. 40 N.Y.2d at 331, 353 N.E.2d at 608, 386 N.Y.S.2d 694. Judge Gabrielli noted that "[i]t suffices to show corroborating circumstances 'which, when considered in connection with the confession are sufficient to establish the defendant's guilt in the minds of the jury beyond a reasonable doubt.'" *Id.* at 332, 353 N.E.2d at 608-09, 386 N.Y.S.2d at 695 (quoting *People v. Conroy*, 287 N.Y. 201, 202, 38 N.E.2d 499, 499 (1941)). The judge thus concluded that there was sufficient proof of homicide to support a murder conviction, despite the lack of any evidence,

Legislative reassessment and clarification are called for if the court chooses to impose felony-murder liability on defendants against whom there is legally insufficient evidence to warrant a conviction of the underlying felony.¹²⁹ If the element of *mens rea* is to be replaced by a showing that death occurred in the course of a felony, it is submitted that the commission of the felony should be subject to a standard of proof similar to that required for the element thus replaced.

EFFECT OF ABOLITION OF THE FELONY-MURDER RULE

The experience in England following abolition of the felony-murder rule suggests that its demise would have little effect on the rate of conviction for killings occurring in the course of felonies.¹³⁰ The drafters of the Model Penal Code have stated that if any change in the rate of conviction were to appear, there would be comfort in the knowledge that the convictions obtained were "based on solid grounds."¹³¹

other than an uncorroborated confession, that a robbery—the predicate felony—had been committed.

Judge Jasen, in dissent, argued that a conviction for felony-murder is unsupportable when the evidence is legally insufficient to support a conviction for the underlying predicate felony. The judge emphasized that New York's recently revised form of indictment, N.Y. CRIM. PROC. LAW § 200.50 (McKinney Supp. 1977-1978) (effective 1971), which requires the allegation of murder and felony-murder in separate counts, as well as the allegation of a predicate felony in a felony-murder indictment, had effectively overruled *People v. Lytton*, 257 N.Y. 310, 178 N.E. 290 (1931) (Cardozo, J.) (dictum) (since indictment need not allege that homicide was committed in course of another felony, there is no need for independent corroboration of the underlying felony). Under the present statute, Judge Jasen argued, the prosecution had not met its burden of proving every element of the alleged crime beyond a reasonable doubt, since the evidence was legally insufficient to convict the defendant of the felony underlying the homicide:

Although corroboration need not extend to every element of the crime, each element must be proved beyond a reasonable doubt. Where there is no proof of an intent to kill and no corroboration of an admission that a predicate felony occurred, the element of *mens rea* has not been established to the extent required by law. Here, there has been no proof of intent and, likewise, no legally sufficient proof of the predicate felony of attempted robbery. Hence, there has been no sufficient proof of defendant's guilt of intentional murder, or of felony murder. It is fundamentally unfair, if not shocking to the concerned conscience, that, as our three colleagues maintain, an unproved felony may be employed to artificially raise the defendant's culpable mental state. Surely, it is wrong to read the felony out of felony murder. . . . We would hold that a manslaughterer cannot be punished as a murderer because of the unsupported use of a legal fiction.

40 N.Y.2d at 344, 353 N.E.2d at 616-17, 386 N.Y.S.2d at 702-03 (Jasen, J., dissenting).

Judge Wachtler, who cast the deciding vote, apparently agreed with the dissent that corroboration of the underlying felony itself is necessary for a felony-murder conviction—but found that the robbery had been sufficiently corroborated to support the conviction. *Id.* at 335, 353 N.E.2d at 611, 386 N.Y.S.2d at 697 (Wachtler, J., concurring).

¹²⁹ See N.Y. CRIM. PROC. LAW § 60.50, commentary at 145 (McKinney Supp. 1977-1978).

¹³⁰ Convictions for felony-murder can ordinarily rest on other grounds. See Comment, *Felony-Murder in Illinois*, 1974 U. ILL. L. REV. 685, 693.

¹³¹ MODEL PENAL CODE § 201.2, Comment 4 (Tent. Draft No. 9, 1959).

In jurisdictions which adopt the common law definitions of murder, either by implication or by statutory codification, abolition of the rule would have little effect in those cases where criminal liability also could be based on malice implied from the reckless commission of an act "creat[ing] a strong probability of death, or great bodily harm,"¹³² from acts committed "recklessly under circumstances manifesting extreme indifference to the value of human life,"¹³³ or from acts "evincing a depraved mind regardless of human life."¹³⁴ It is those cases for which no other basis for criminal liability exists which result in harsh and unjustified application of the felony-murder rule.

Both felony-murder and its companion doctrine, misdemeanor-manslaughter, operate either to create a conclusive presumption of mens rea or to impose strict liability for homicide without regard to mens rea.¹³⁵ Only fifteen states specifically provide for application of the misdemeanor-manslaughter rule,¹³⁶ while four more apply the common law rule.¹³⁷ The majority of recent recodifications have followed the example of the Model Penal Code by rejecting misdemeanor-manslaughter.¹³⁸ Ironically, the number of jurisdictions which recognize the injustice of imposing strict criminal liability for this lesser crime is significantly greater than those holding a similar opinion of felony-murder.

The concept of basing the degree of punishment on the seriousness of the result of the criminal act seems grossly misplaced in a legal system which recognizes the degree of mental culpability as the appropriate standard for fixing criminal liability.¹³⁹ The abolition of the felony-murder rule

¹³² See ILL. ANN. STAT. ch. 38, § 9-1(a)(2) (Smith-Hurd Supp. 1978); N.Y. PENAL LAW § 125.25(2) (McKinney Supp. 1977-1978).

¹³³ MODEL PENAL CODE § 210.2(1)(b) (Prop. Official Draft 1962). See ARK. STAT. ANN. § 41-1503(1)(b) (1977); N.D. CENT. CODE § 12.1-16-01(2) (1976); OR. REV. STAT. § 163.118(1)(a) (1975).

¹³⁴ ALA. CODE tit. 14, § 314 (1959). See MINN. STAT. ANN. § 609.195(1) (West Supp. 1964); N.M. STAT. ANN. § 40A-2-1(4) (1972); OKLA. STAT. ANN. tit. 21, § 701.8(1) (West 1978); OR. REV. STAT. § 163.115 (1975); S.D. COMPILED LAWS ANN. § 22-16-7 (Supp. 1976); UTAH CODE ANN. §§ 76-5-203(1)(c) (1977); WASH. REV. CODE ANN. § 9A.32.030(1)(b) (1977); WIS. STAT. ANN. § 940.02 (West 1958).

¹³⁵ See notes 108-19 and accompanying text *supra*.

¹³⁶ ALA. CODE tit. 14, § 320 (1959); IDAHO CODE § 18-4006(a), (c) (Supp. 1977); IND. CODE ANN. § 35-42-1-4 (Burns Supp. 1977); IOWA CODE ANN. § 690.10 (West 1950); KAN. STAT. § 21-3401 (1974); LA. REV. STAT. ANN. § 14:31(2)(a) (West 1974); MISS. CODE ANN. § 97-3-27 (1972); NEB. REV. STAT. § 28-305 (1977); NEV. REV. STAT. § 200.040 (1975); N.M. STAT. ANN. § 40A-2-3(B) (1972); OHIO REV. CODE ANN. § 2903.04(B) (Page 1975); OKLA. STAT. ANN. tit. 21, § 711(1) (West 1958); S.D. COMPILED LAWS ANN. § 22-16-15(1) (Supp. 1976); TENN. CODE ANN. § 39-2409 (1975); WYO. STAT. § 6-58 (1959).

¹³⁷ See MD. ANN. CODE art. 27, § 387 (1976); MICH. COMP. LAWS ANN. § 750.321 (1968); R.I. GEN. LAWS § 11-23-3 (1970); S.C. CODE § 16-3-50 (1976).

¹³⁸ W. LAFAVE, MODERN CRIMINAL LAW 275 (1978).

¹³⁹ See, e.g., Gegan, *Criminal Homicide in the Revised New York Penal Law*, 12 N.Y.L.F. 565, 586-87 (1966), wherein the author observes:

It is indeed hard to state a justification for the constructive *mens rea* of felony murder in terms of accepted notions of the purpose and efficacy of penal sanctions and individ-

would have the effect of replacing retribution with blameworthiness as a guide to imposition of punishment.

While it seems clear that application of the felony-murder rule is unjustified except in those instances where criminal liability has an independent basis, legislatures are understandably reluctant to abolish the rule altogether.¹⁴⁰ Such a move may appear to legislators' constituents to indicate a soft position on crime. In view of public sentiment favoring a "law and order" approach, outspoken advocacy of abolition of the rule could be tantamount to political suicide. It would appear that efforts to educate the public regarding the shortcomings of the doctrine must precede any campaign of abolition.

Nonetheless, some guidelines may be suggested in order to make the operation of the doctrine more palatable. It has been demonstrated that the most telling criticisms of the doctrine fall into four categories: (1) its retributive purpose does not accord with our current notions of punishment based upon culpability; (2) its use to establish vicarious liability similarly does violence to our concept of culpability; (3) its presumption of a *mens rea* for murder may offend constitutional notions of due process; and (4) its use affords unjust procedural advantages to the prosecution. All of these criticisms are answerable, at least to some extent, by the various limitations which have been put into effect by many of the jurisdictions. For example, restriction of application of the rule solely to inherently dangerous felonies¹⁴¹ does much to rationalize the imposition of a murder conviction upon perpetrators of such crimes who kill their victims, for this heightens the felon's culpability for the results of his actions. Likewise, the vicarious liability which seems so misplaced can be limited by invocation of an affirmative defense¹⁴² and by redefinition of felony-murder to extend only as far as killings done "in furtherance of" the felony.¹⁴³ The due process question raised by the "conclusive presumption" approach to felony-murder can be obviated by adoption of the Model Penal Code's rebuttable presumption of a *mens rea* for murder which attaches after proof of the felony,¹⁴⁴ or by other formulations which require proof of a *mens rea* to establish felony-murder.¹⁴⁵ Use of the merger doctrine¹⁴⁶ can avoid at least

ual fairness. If one had to choose the most basic principle of the criminal law in general and the new Penal Law in particular it would be that criminal liability for causing a particular result is not justified in the absence of some culpable mental state in respect to that result. . . .

The felony murder rule violates this principle by dispensing with any culpable mental state in relation to the death caused thereby, contenting itself with whatever *mens rea* existed respecting the collateral felony.

¹⁴⁰ See, e.g., Denzer, *supra* note 4, at 260.

¹⁴¹ See notes 12-37 and accompanying text *supra*.

¹⁴² See notes 87-91 and accompanying text *supra*.

¹⁴³ See notes 72-86 and accompanying text *supra*.

¹⁴⁴ See notes 47-51 and accompanying text *supra*.

¹⁴⁵ See notes 45-46, 52-57 and accompanying text *supra*.

¹⁴⁶ See notes 58-70 and accompanying text *supra*.

some of the most unfair of the procedural advantages awarded to the prosecution when it proceeds on felony-murder grounds. Finally, those states which treat homicide committed in the course of a felony as something less than felony-murder¹⁴⁷ have, in effect, abolished felony-murder. All of these ameliorative devices have the beneficial effect of making application of the felony-murder doctrine both more humane and more rational.

It should be noted, however, that the rule remains essentially inhumane and irrational, for the limiting devices do not entirely correct its flaws and inequities. The potential for—and reality of—injustice will continue to exist so long as vestiges of the rule remain operative. It is therefore submitted that, although the viability of the felony-murder doctrine may be enhanced by the imposition of such limitations, the jurisdictions should strive for total abolition of the rule at the earliest practicable opportunity.

¹⁴⁷ See notes 38-44 and accompanying text *supra*.